Clk. Sup. Ct. U. S.

SUPREME COURT OF THE UNITED STATES.

No. 256. 171. 82. 56. 53

THOMAS J. MILES, APPELLANT,

*v.*

WILLIAM D. CALDWELL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

G. S. GIDEON, Printer, No. 511 Ninth Street, Washington, D. C.

Rev with cert

Jan: 3/68

385

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## No. 256.

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Missouri District, sct. In Circuit Court of United States for Districts of Missouri.

Pleas before the Honorable Robert W. Wells and Honorable Samuel Treat, Judges of the Circuit Court of the United States for the Districts of Missouri, at April Term of said Court, in the year 1860.

WILLIAM D. CALDWELL, complainant,
*against*
THOMAS J. MILES, defendant.
} In Chancery.

Be it remembered that heretofore, to wit, on the 15th day of November, A. D. 1856, the complainant in the above entitled cause, by his solicitors, filed in the office of the clerk of Circuit Court of the United States for the District of Missouri, his bill in chancery against the said defendant, which is in the words and figures following, viz.:

*Bill in Chancery.*

To the honorable judges of the Circuit Court of the United States, within and for the District of Missouri, in chancery sitting.

Your orator, William D. Caldwell, of Marion County, in the State of Missouri, and who is a citizen of said State of Missouri, brings this bill against Thomas J. Miles, of the city of Philadelphia, in the State of Pennsylvania, and who is a citizen of said last-mentioned State, and complains as follows, viz.:

That on the 3d day of September, 1835, Rodes Gentry and wife, being the owners of the parcels of land lying in Marion County, Missouri, and hereinafter next described, that is to say, the north-east qr. of section 21, the east half of the northwest qr. of section 21, except thirty acres lying at the south part of the last-mentioned tract; the west half of the northwest qr. of section 21; the east half of the northeast qr. of section 20, excepting three acres at the south end of said last-mentioned tract, and the west half of the southwest qr. of section 21, all lying in township 57, range 6, west of lands sold by the United States at Palmyra, and containing 447 acres, sold and conveyed the said lands to Ezra S. Eli, by their deed of that date, which was duly acknowledged on the 4th September, 1835, and filed for record on the same day, and recorded in the office of the recorder of Marion County, Missouri. The original of

said deed not being in the power of the plaintiff, a certified copy of same is filed and marked as Exhibit No. 1.

That on the 18th day of November, 1837, or rather by a deed dated on that day, said Ely conveyed to James Gallaher all the said lands which Rodes Gentry and wife so conveyed to him, except fifteen acres which he had previously sold to Benjamin Pyatt, Alexander J. Dallas, and J. C. Beatty, to be taken out of the northeast qr. of section 21 aforesaid. This last-mentioned conveyance was a mortgage conditioned to secure to said Gallaher, his heirs and administrators, the sum of two thousand eight hundred and sixty-six dollars and ninety-seven cents, together with eight per cent. interest on the same, as evidenced by the note of said Ely to said Gallaher, dated Nov. 18th, 1837, and payable two years from date, was duly acknowledged Nov. 22d, 1837, filed for record December 4, 1837, and recorded as aforesaid. The original of said mortgage not being in the power of the plaintiff, a certified copy of same is filed herewith, and marked as Exhibit No. 2.

That on the 5th day of May, 1841, the said Ezra S. Eli confessed a judgment on the said note for twenty-eight hundred and sixty-six dollars and ninety-seven cents in the Circuit Court of Marion County, Missouri, and on such confession a judgment was by said court rendered in favor of said Gallaher against said Ely, for the sum of two thousand eight hundred and sixty-six dollars and ninety-seven cents debt, and the further sum of three hundred and sixty-five dollars and fifty-eight cents damages, and the said judgment was by its terms to bear eight per centum interest per annum till paid.

That on the 11th day of April, 1842, on exception issued on said judgment, directed to the sheriff of Marion County aforesaid, and returnable to the court on the first Monday in May, 1842, which execution was levied on the said lands which said Ely had mortgaged to said Gallaher as aforesaid, and the same were duly advertised, and, on the 12th day of September, 1842, duly sold by said sheriff to said Gallaher, who was the highest and best bidder at said sale, for the sum of three hundred and thirteen dollars and fifty cents. That said execution was levied on the lands mentioned in the mortgage by the direction of said James Gallaher, and with the consent of said Ely; that said Ely made no objection to said sale, but both he and said Gallaher considered, agreed, and intended that said sheriff should sell and pass the title to the mortgaged lands at said sale, and that both the said Gallaher and said Ely, at the time of sale and afterwards, considered and treated said sale as valid.

A transcript of the record of said confession of judgment by Eli to Gallaher, said execution, levy, and sale being duly certified from the office of the clerk of the Circuit Court of Missouri, county aforesaid, is filed here, and marked Exhibit No. 3.

On the 12th day of September, 1842, Jordan I. Montgomery, sheriff of Missouri, county aforesaid, made a deed to said James

Gallaher, reciting said judgment, execution, levy, and sale, and conveying to the said Gallaher, his heirs and assigns, the lands so sold by him. Said original sheriff's deed is not in the power of the plaintiff; he files herewith a certified copy of same, marked Exhibit No. 4. Said deed was duly acknowledged August 25, 1843, was filed for record Feb. 17, 1845, and was duly recorded as aforesaid.

That after said sheriff's deed was made and delivered to said Gallaher, said Ely expressly recognized the validity of said sheriff's sale, by an agreement in writing which he entered into with said Gallaher, touching a repurchase by him (Ely) of said lands; said agreement was dated Nov. 1st, 1843, and will be filed herewith, and marked Exhibit No. 5. It provides that if the said Ely shall, within the term of three years from its date, pay to Gallaher the amount, including principal, interest, and costs of his said judgment against Ely, then he (Gallaher) will convey to said Ely, his heirs or assigns, all his right and title to the lands which he had purchased at said sheriff's sale. Said agreement also witnessed that on the day of its date, said Ely had delivered to said Gallaher six shares of Jefferson Medical College stock, amounting to three thousand dollars, which sum was to be credited on the debt of Gallaher.

That when the said term of three years was about to expire, said lands had very greatly depreciated in value, and the said Ely was entirely bankrupt, and wholly unable to pay to said Gallaher the residue of his judgment, principal, interest, and costs, after applying said credit of three thousand dollars; and said Gallaher being more desirous of recovering his money than of retaining the lands, contracted and agreed with James H. Patterson to convey to him, said Patterson, by deed of quitclaim, all the said lands mentioned in said sheriff's deed to Gallaher, provided the said Ely would consent thereto, and provided said Patterson would pay to him, Gallaher, his demands under said agreement, dated Nov. 1, 1843. Said Ely consented to surrender his rights under said agreement, and accordingly drew a written order on said Gallaher, authorizing him, in case said Patterson would pay him his money, to convey said lands to him, Patterson, which written order was afterwards presented by said Patterson to said Gallaher, and thereupon said Patterson paid to said Gallaher the amount of money then remaining due to said Gallaher, which amount was $955$\frac{70}{100}$, and in consideration of said money, and of the said order of said Eli, said Gallaher, on the 31st day of October, 1846, by his deed of that date, sold and conveyed to said Patterson, and his heirs, all the said lands mentioned in said sheriff's deed to him; the said deed to Patterson described the property conveyed by it in these words: "A farm in Marion County, now in the possession of Dr. Ferguson, known as the Gentry farm, being the same farm conveyed to said Gallaher by the sheriff under the execution issued on the above-mentioned judgment.

And in a previous part of said deed the aforesaid judgment, which

said Ely had confessed in favor of said Gallaher, was recited. The said lands which said Ely mortgaged to said Gallaher, had been and are there known as the Gentry farm, and one Dr. Furgoson was then residing on them; said deed to Patterson was legally acknowledged October 31, 1846, filed duly for record November 14, 1846, and recorded as aforesaid. It is filed herewith, and marked Exhibit No. 6. Said order of Ely to Gallaher is lost or destroyed.

That on the fifth day of November, 1846, the said James H. Patterson, for a valuable consideration, conveyed the said lands to Thomas H. Tatlow, his heirs and assigns; said last-mentioned deed was duly acknowledged on the day of its date, was duly filed for record November 14, 1846, and was recorded as aforesaid. It is filed herewith, marked Exhibit No. 7.

That on the 22d day of September, 1849, the said Tatlow conveyed to the complainant, for a valuable consideration, part of the said lands, which part is described as follows, to wit: Beginning at the northeast corner of section 21, running thence 240 poles, west thence 53½ poles south, thence 240 poles east, thence 53½ poles north to the beginning, containing eighty acres. Said last-mentioned conveyance was duly acknowledged on the day of its date, and was duly filed for record September 29, 1849, and recorded as aforesaid.

And your orator further states, in reference to said conveyance, by said Tatlow to him, that in and by the same said Tatlow binds himself to warrant and defend the title of the land therein named unto your orator, his heirs and assigns, against all persons and claims whatsoever. Said deed is filed herewith, and marked Exhibit 8.

That afterwards, when it was ascertained that the order of the said Ely to Gallaher, authorizing him, Gallaher, to convey said lands to said Patterson could not be found; and it was deemed proper to put upon the record some conclusive evidence that said Ely had induced said Gallaher to convey said lands to said Patterson, and had surrendered absolutely any right, title and interest he might have in and to said lands, he, said Ely, did, in consideration of his said order to Gallaher, and of the further sum of two hundred dollars paid to him by said Patterson, sell and convey to said Tatlow all his right, title and interest in the said lands (which he had so mortgaged to said Gallaher) by his deed, dated January 1, 1850, which last-mentioned deed was duly acknowledged January 15th, 1850, duly filed for record, January 30, 1850, and recorded as aforesaid, the original thereof not being in the power of the plaintiff, a certified copy of the same is filed herewith, and marked Exhibit No. 9.

Your orator further states, that in February, 1850, he entered into possession of the eighty acres of land sold and conveyed to him, as aforesaid, by Tatlow, and has held possession thereof ever since; that when he so took possession thereof he believed his title to the

same to be good. That said Rodes Gentry derived his title to said lands by purchase under the United States: that is, the land was sold by the United States, at the Palmyra Land Office, and said Gentry held by a regular chain of conveyance from the grantees of the United States. That your orator took possession of said eighty acres of land under the title set forth herein, and he states he has made valuable and lasting improvements on the same in good faith, intending to render said lands so held by him as productive and valuable as he could; that in making and repairing the fences and inclosures upon said eighty acres, in furnishing rails for the same, in hauling and labor bestowed in that behalf; in clearing and putting under fence a part thereof which was in thicket or brush when he took possession, and in sowing said last-mentioned part down in blue grass, which part, so put into grass, embracing about ten acres, the whole portion of said eighty, which was so inclosed, being about 53⅓ acres; in clearing out fence-rows, in order to reset and build fences; in excavating the earth to make and in making three several ponds for stock water thereon; in depositing thereon manure, and spreading the same so as to enrich the soil, and in subsoil ploughing on the said land in order to improve the same, your orator has during the time for which he has been in the possession whereof made valuable and lasting improvements thereon of the value of five hundred and thirty-seven dollars, $537. And your orator states, that he made all said improvements in good faith, and under the belief that he had a good title to the said land so occupied by him and so improved.

Your orator further states, that in the years 1836 and 1837 said Ezra S. Ely was greatly embarrassed with debt; that your orator is informed and believes, and on his information and belief charges the fact to be, that in the summer of 1837 said Ely's debts amounted to more than one hundred thousand dollars, and that the debts of said Ely and that time and ever since were and have been greater than his means of payment.

That on the 22d November, 1837, said Ely made and delivered to Margaret Carswell, his mother-in-law, and Samuel McClelland, his son-in-law, of the city of Philadelphia, Pennsylvania, a deed of trust, whereby he recited that he and the government of the United States and the banks throughout the country had stopped payment, and that he was afraid that some of his creditors might sacrifice his property to pay themselves, and in consideration thereof, and of ten dollars paid to him by said Carswell and McClelland, he proceeded to convey to said Carswell and McClelland a very large amount of real and personal property, including all the aforesaid land which Rodes Gentry and wife had conveyed to him, and in and by said deed it was further provided that said Carswell and McClelland should hold and possess or dispose of the property thereby granted agreeably to the provisions of said trust, which were these in substance:

First. That said trustees should allow said Ely, as their agent and attorney, to take charge of all the property conveyed by the deed.

Second. Said Ely, with the consent and advice of said trustees, or either of them, to sell every portion of the personal property named in the deed, and appropriate the proceeds to any of said Ely's existing debts.

Third. Said trustees to allow said Ely, nevertheless, to use said personal property for the support of himself and family, and increase of his means of discharging his debts till it should be sold.

Fourth. At any time prior to the 1st day of January, 1842, said trustees, with the consent of said Ely and his wife, might sell and convey the real estate mentioned in said deed, and appropriate the proceeds to any of the deeds of said Ely they might see fit.

Fifth. If any of the said Ely's debts should remain unpaid after January 1st, 1842, said trustees might sell any part of the property conveyed by the deed, without said Ely's consent, and pay all the debts in full, or rateably if not sufficient to pay all.

Sixth. Any creditor who should attempt to collect any debt of said Ely by law was to be expressly excluded from the benefit of the said trust.

Said last-mentioned deed was duly acknowledged on the day of its date, was filed for record on the 5th day of December, 1837, and was recorded as aforesaid. It is filed herewith, and marked Exhibit No. 10.

On the 5th day of January, 1838, said Ely made and delivered another deed to the said Carswell and McClelland, in which he recited that he had previously made sundry deeds of assignment, the originals of which bore date November 22d, and December 7, 1837, and which had been filed for record in the counties of Marion and Ralls, and that he had been advised by counsel that said deed was void, that he was then indebted to his ward, Mary A. E. Carswell, thirty thousand dollars, with interest thereon for several years, and to his wards, the children of Clement Lee Bready, in not less than four thousand dollars, and that he had received of said Carswell and McClelland the farther sum of ten dollars, and in and by said deed proceeded to convey to said Carswell and McClelland a large amount of real estate, including the aforesaid lands sold and conveyed to him by Rodes Gentry and wife, and also a very large amount of personal property, consisting of choses in action at the time due, slaves, the unexpired times of slaves, not having five years to run, horses and mares, bricks in the kiln, a large quantity of corn and hay, also some oats, yokes of oxen, all the cattle on his farm, a flock of sheep, a herd of swine, all the rent then due him or that should become due to him from any of his houses or lands during the next five years, with all the increase and issues of his said animals and cultivated fields during said five years; also all his wagons, carts, ox-yokes, chains, ploughs, ropes, harrows, hoes, pickaxes, saws, spades, shovels,

scythes and schnathes, and harness, a library, and a large quantity of household and kitchen furniture, carpets and crockery ware, the greater portion of which said personal property was perishable in its nature, and necessarily to become of no value before the expiration of five years from the date of said deed.

And in and by the said deed it was substantially provided that no part of the property conveyed by said deed should be appropriated to the payment of the debts therein named till the expiration of five years from the date of said deed, and said deed was made expressly subject to the condition, that if within five years from the date of said last-mentioned deed, said Ezra S. Ely, his heirs, executors, or administrators, or any of them, should pay the debts mentioned therein, said deed was to become void, otherwise to remain in force. Said last-mentioned deed was written out by said Ely over an acknowledgment previously prepared, and dated January 6, 1838. It was filed for record January 8, 1838, and recorded as aforesaid. The original is in the possession of Thos. J. Miles, the defendant in this suit, as your orator is informed, and believes, and therefore charges. A copy thereof is exhibited herewith, and marked No. 11. That said deed of November 22d, 1837, was made and delivered had contrived and intended by and between the said Ezra S. Ely and the said Carswell and McClelland, with the intent to hinder and delay and defraud the creditors of said Ely, and any purchaser from him.

That the said deed, dated January 5, 1838, was made and delivered, contrived and intended by and between said Ezra S. Eli and the said Carswell and McCleland, to hinder, delay, and defraud the creditors of said Ely, and any purchaser from him.

That after the execution and delivery of said deed of November 22d, 1837, and January 5th, 1838, the property mentioned in them continued in the possession and under the control and use of said Ely, and was managed and disposed as said Ely saw fit.

On the 23d day of August, 1843, said Ezra S. Ely and said Samuel McCleland and Margaret Carswell, further combining and confederating to consummate and carry out the fraud intended, caused proceedings to be set on foot in the Circuit Court of Marion County, Missouri, to procure a formal foreclosure of the said deed of mortgage, dated January 5, 1838; and said Carswell and McClelland presented their petition in said court, praying that the said mortgage might be foreclosed, and thereupon said Ely voluntarily appeared by his attorney, and confessed the action of the plaintiffs for the sum of thirty-four thousand dollars, and consented that an order of sale should be made against the property mentioned therein, and judgment was accordingly rendered for said debt and costs, and an order of sale made.

On the 16th day of October, 1843, an execution issued on said judgment and order of sale to the sheriff of Marion County; and on the 12th November, 1843, after being duly advertised, the real estate

mentioned in said mortgage, and lying in Marion County, was sold by the sheriff, including therein the said lands sold by said Rodes Gentry and wife to Ely, containing 447 acres, to said McClelland, for the sum and price of fifty cents, and the residue of said lands were purchased at about the same rates, all of which will appear by a transcript of the record of said proceedings from the clerk of said court filed herewith, and marked, Exhibit No. 12.

That afterwards, on the 17th day of November, 1843, said sheriff executed and delivered to said Carswell and McClelland a deed, conveying to them all the lands so purchased at said sheriff's sale, including the aforesaid 447 acres, which Rodes Gentry and wife conveyed to said Ely; said original deed is not in the power of your orator, nor has he any copy thereof, but the same shall be filed, if necessary, and marked, Exhibit No. 13.

On the 27th day of March, 1850, said Carswell and McClelland made and delivered to the defendant, Thomas J. Miles, a deed of conveyance, assigning and releasing unto him and his heirs all their right, title, and interest which they had or held in the lands mentioned in the mortgage deed of January 5th, 1838, or the sheriff's deed of November 17, 1843; said last-mentioned deed was made without any consideration, and the said Miles took thereby only such title, and no more than said Carswell and McClelland had, and at the making and delivery of said last-mentioned deed, said Miles had full notice of all the fraudulent contrivance and intents which are charged in this bill; said last-mentioned deed was duly acknowledged. It was filed for record June 17, 1850, and recorded as aforesaid. The original is not in the power of the plaintiff. A certified copy is filed herewith, marked Exhibit No. 14.

Your orator further states, that on the 12th day of September, 1855, the said Thomas J. Miles commenced an action of ejectment on the common law side of this honorable against your orator, for the recovery of the 80 acres of land afore-mentioned, conveyed to him by said Tatlow, and such proceedings were had in said cause, as that of the present term of said court, a verdict has been found by a jury that said Miles is entitled to the possession thereof, and also to the sum of 540 dollars damages, and eight dollars for monthly rent of said recovered premises dollars for his damages in that behalf, and a judgment has been rendered in accordance with said verdict; the record in said is by reference made part hereof.

Whereas, in fact and truth, in good conscience and equity, said Miles has no title to the said lands so recovered, and your orator has no doubt, and is informed and believes, that by bringing his action of ejectment against said Miles, he might recover the possession back again, after the judgment shall be executed, but that he is also advised that such a process could not quiet his title to the land in dispute, and would therefore afford no permanent relief to him.

Your orator states, several years ago the said Thomas J. Miles

claiming title to lands in Marion County, Missouri, under the said fraudulent mortgage, dated January 5, 1838, instituted sundry suits in the Circuit Court of Marion County, one of which was against Moses Gentry, and involved the title to a portion of the land embraced in the mortgage by said Ely to Gallaher. In all said suits the plaintiff failed.

In tender consideration of the premises, and forasmuch as your orator is without any adequate remedy save in chancery, where the titles may be effectually quieted, and clouds may be removed from them, and where parties holding fraudulent incumbrances, or other claims upon real estate, are compelled to release them, and where such fraudulent conveyances may be cancelled, and where, also, in proper cases compensation may be decreed to parties who have, in good faith, made permanent and lasting improvements on land.

To the intent, therefore, that justice may be done in the premises, the complainant prays that said defendant, Thomas J. Miles, be made defendant to this bill, that process issue against him, that he may answer this bill (answer on oath waived); and the complainant prays that an injunction issue to said Miles, prohibiting him against taking possession of said lands till the final hearing of this cause; also against proceeding to sue out any execution on said judgment for damages, or monthly value or costs, and that said mortgage deed of January 5th, 1838, and sheriff's deed of November 17, 1843, may be decreed to be null and void as to the enforcement; or if your orator is not so entitled, then, that said Miles may release to him all right to said eighty acres of land derived from said mortgage deed of January 5, 1838, and sheriff's deed of November 17, 1843, each made to said Carswell and McClelland; or if your orator is not so entitled, then that said Miles may account to him for the valuable and lasting improvements aforesaid, which he has put upon said land so occupied by him; and the complainant prays that said judgment at law may be perpetually enjoined, and he prays for general relief in the premises, and as in duty bound he will ever pray, &c.

GLOVER & RICHARDSON,
Solicitors for Complainants.

This day William D. Caldwell, complainant in the above bill, came here into court and made oath that the statements in the foregoing bill, so far as made on information and belief, he believes them to be true, and in so far as the statements made therein on his own knowledge, they are true.

W. D. CALDWELL.

Sworn to before me by William D. Caldwell, November 15th, 1856.

BEN. F. HICKMAN,
Clerk U. S. C. C.

And afterwards, viz., on the 19th day of November, 1856, at a Circuit Court in and for said district, the following order was made:

*Motion for Injunction.*

WILLIAM D. CALDWELL, complainant,
*v.*
THOMAS J. MILES, defendant. } In Chancery.

This day comes the complainant, by his solicitor, and moves the court, upon the bill filed herein on the 15th instant, for an injunction, enjoining and restraining the defendant from any other or further proceedings on the judgment rendered herein at present term of this court, in favor of defendant against complainant, which motion was opposed by Thomas T. Grantt, attorney for defendant, and said motion in part heard, but not being concluded at hour of adjournment, further proceedings are continued until to-morrow morning.

*Motion for Injunction Sustained.*

And afterwards, to wit, on the 20th day of November, 1856, at at a circuit court, in and for said district, the following order was made.

WILLIAM D. CALDWELL, complainant,
*v.*
THOMAS J. MILES, defendant. } In Chancery.

This day comes again the complainant, by his solicitor, and the court having fully heard the motion for an injunction herein, and being fully advised of and concerning the same, now orders that said motion be sustained, and the injunction granted, until the further order of this court upon the complainant's executing bonds in the sum of two thousand dollars, conditioned to pay all damages and costs which said defendant may sustain in consequence of the issuing said injunction; and said bond, with Moses Gentry security, being executed and approved by the court, it is now ordered that all further proceedings at law upon said judgment, rendered at this term, in favor of Thomas J. Miles against William D. Caldwell, be enjoined and restrained until the further order of this court; and it is further, that if the process or subpœna in chancery, which may be issued in this cause, cannot be served on the said Miles, then the marshal is directed and ordered to serve said summons in the usual manner, on Thomas T. Grantt, the attorney for said Miles.

*Injunction Bond.*

The following is a copy of the injunction bond:
Know all men by these presents, that we, William D. Caldwell,

and Moses Gentry, security, are held and firmly bound unto Thomas J. Miles, in the penal sum of two thousand dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly to these presents. Sealed with our seals, and dated this twentieth day of October, 1856.

The condition of the above obligation is such, that whereas the above bound William D. Caldwell has prayed for and obtained an injunction upon his bill in chancery, filed in the Circuit Court of the United States for the District of Missouri, against the above-named Thomas J. Miles, enjoining and restraining the said Thomas J. Miles from issuing his writ of possession upon a judgment at law, obtained in said Circuit Court by him against the said William D. Caldwell, on the 28th day of October, 1856, for the possession of a tract of land, described as follows: beginning at the northeast corner of northeast quarter of section (21) twenty-one, in township fifty-seven, north of range six west, and running thence westwardly two hundred and forty poles, thence southwardly 53½ poles, thence eastwardly 240 poles, thence to the beginning, containing 80 acres; and also enjoining and restraining the said Thomas J. Miles from issuing his writ of execution for five hundred and forty dollars damages, and eight dollars monthly damages and costs of suit upon the said judgment aforesaid, by him recovered against the said William D. Caldwell.

Now, if the said William D. Caldwell shall well and truly pay all sums of money and damages and costs which shall be awarded in the injunction aforesaid, in case the same shall be dissolved in whole or in part, and shall also pay all costs and damages arising up to the final disposition of said bill in chancery, and obey all the orders made in said suit in chancery, then this obligation shall be void; otherwise the same to remain in full force and virtue.

W. D. CALDWELL. [SEAL.]
MOSES GENTRY, [SEAL.]
By his attorney in fact, S. F. GLOVER.

The within bond was acknowledged in open court by William D. Caldwell and S. T. Glover, attorney in fact for Moses Gentry, this 20th day of November, 1856.

BEN. F. HICKMAN,
Clerk.

*Power of Attorney—Gentry to Glover.*

Know all men that whereas, at the present term of the Circuit Court of the United States for the District of Missouri, a verdict has been rendered at the suit of Thomas J. Miles against Wm. D. Caldwell in an action of ejectment, and whereas the said Caldwell may see fit to remove the record into the Supreme Court of the

United States by appeal or writ of error, or may see fit to enjoin said proceedings in said action of ejectment, I, Moses Gentry, do hereby authorize or empower Samuel T. Glover, or John C. Richardson, to sign my name as surety to any bond that said Wm. D. Caldwell may wish to give, or that may be necessary for him to execute in his further litigation with said Thomas J. Miles in the premises. In testimony whereof said Moses Gentry has hereunto set his hand and seal, Nov. 14, 1856.

MOSES GENTRY. [SEAL.]

United States of America, District of Missouri, *sct.*

Be it remembered, that Moses Gentry, who is personally known to the undersigned, clerk of the United States Circuit Court within and for the District of Missouri, to be the person whose name is subscribed to the within power of attorney, as a party thereto, this day appeared before me and acknowledged that he executed and delivered the same as his voluntary act and deed, for the uses and purposes therein contained.

In witness whereof I hereto set my hand and affix the seal of [L. S.] said court this seventeenth day of November, in the year of our Lord eighteen hundred and fifty-six.

BEN. F. HICKMAN,
C. C. U. S. Mo. Dist.

*Subpœna in Chancery.*

The following is a copy of the summons:

Missouri District, *sct.*

The President of the United States to Thomas J. Miles, greeting.

You are hereby commanded to be and appear before the honorable Circuit of the United States for the District of Missouri, on the first Monday of January next, at the city of St. Louis, then and there to answer the bill of complaint of William D. Caldwell, a citizen of the State of Missouri, filed against you on the fifteenth day of November, 1856. Hereof fail not.

Witness the Honorable Roger B. Taney, Chief-Justice of the [SEAL.] United States, the (5th) fifth day of December, 1856. Issued at office in the city of St. Louis, the day and year last aforesaid.

BEN. F. HICKMAN,
Clerk.

Indorsed as follows:

The complainant having executed bonds in the penalty of $2000, as required by the order of the court, and the court having granted him an injunction, as prayed for in this bill, this will therefore enjoin and restrain all further proceedings on the judgment at law in

favor of Thomas J. Miles against the complainant, at the October term, 1856, of this court. And the marshal will, by order of court, in case the defendant cannot be found, serve this subpœna on his attorney, Thomas T. Gantt.

Witness, BEN. F. HICKMAN,
Clerk U. S. C. C.

*Marshal's Return.*

Afterwards the marshal made the following return:

I hereby certify that I served the within subpœna and writ on Thomas T. Gantt, Esq., attorney for defendant (the defendant not being found in my district), by reading the same to him and within his hearing, and by delivering to him a copy of the writ, together with the copy of the declaration thereto attached, at St. Louis, Mo., on the 11th day of December, 1856.

THOMAS S. BRYANT,
U. S. Marshal, Missouri District.

And afterwards, viz., on the 10th day of April, 1858, at a Circuit Court in and for said district, the following order was made:

*Defendant's Answer Filed.*

WILLIAM D. CALDWELL, complainant,
*v.*
THOMAS D. MILES, defendant. } In Chancery.

This day came the defendant, Miles, by his solicitor, and files his answer to the bill of complainant herein against him.

The answer is as follows:

*Answer to Bill.*

THOMAS J. MILES, respondent,
*v.*
WILLIAM D. CALDWELL, complainant. } In Chancery.

In the Circuit Court of the United States for the District of Missouri, sitting as a Court of Equity.

The answer of Thomas J. Miles, respondent, to the bill of complaint of William D. Caldwell, complainant.

The respondent, now and at all times hereafter saving and reserving to himself all benefit and advantage of exception which may or can be had or taken to the many errors, uncertainties, insufficiencies, and other imperfections of the said complainant's bill of complaint, for answer thereto, or unto so much and such parts thereof as this respondent is advised that it is material for him to answer unto, answering saith:

That he admits that Ezra Styles Ely was, in the year 1835, and thereafter, until the year 1843, seized as the owner in fee of the land described in the complainant's bill of complaint, subject to the two mortgages therein described; the first being dated November 18th, 1837, in favor of James Gallaher, as stated in the said bill of complaint, and the other being dated January 5th, 1838, in favor of Mrs. Carswell and Dr. Samuel McClellan, trustees of Mary Ann Ely Miles and the children of Clement Lee Brady. But this respondent feels impelled by duty to traverse and deny so many of the statements woven into the complainant's bill of complaint that he deems it most appropriate, prior to proceeding to consider the bill in detail, to make a concise statement or narrative of the facts, out of which his own connection with Dr. Ezra Styles Ely grew; which statement or narrative is in the words and figures following, viz.: That in the year 1822 Samuel Carswell, a wealthy merchant of the city of Philadelphia, died, leaving four surviving children, among whom he divided, by will, an estate estimated at and actually worth four hundred thousand dollars. Of these children the youngest, named Samuel Kinsey Carswell, was, at the time of his father's death, a minor. By the said will, a copy of which is herewith filed, marked (A., deft's Exh.), the portion of said estate bequeathed to said Samuel Kinsey Carswell, was given to Ezra Stiles Ely, in trust for the use of the said Samuel Kinsey Carswell, for life, remainder to his children. The terms of said trust were that so long as said Samuel Kinsey Carswell should remain unmarried he should receive annually about one-third of the annual interest of the said bequest; the remainder of said interest the said Ely was to invest for the purposes of said trust, and add the same to the income producing part of said estate. The whole of which was personal and mixed property. The said Ezra Styles Ely is the same person who is mentioned by that name in the plaintiff's bill of complaint. The said Samuel Kinsey Carswell afterwards intermarried, and died on the 10th July, 1829, leaving a widow and one child, named Mary Ann Ely Carswell. The widow of said S. K. Carswell died on the 12th August, 1830, and her infant child, by the said S. K. Carswell, was born on the 10th May, 1828. This infant child, before attaining the age of 21 years, became the wife of said defendant. The said Samuel Kinsey Carswell made and left a will, by which he constituted Ezra Styles Ely guardian of his child, in case her mother should die during her nonage, and upon the death of Mrs. S. K. Carswell the said Ezra Styles Ely assumed the office of her guardian accordingly. A copy of the will of *of* Samuel K. Carswell is herewith filed, marked (B., deft's. Exh.)

In 1835 the said Ezra Styles Ely removed with his family and his ward, Mary Ann Ely Carswell aforesaid, to Marion county, Missouri. At this time he had in possession, and took with him to Missouri, the largest portion of the property and money of his said

ward, amounting to upwards of forty thousand dollars. This property was chiefly in money, or stocks convertible into money. He made this conversion of said property into money, and invested the proceeds in lands in Missouri, in the name of him, the said Ely, taking no precaution to declare the trusts thereof in favor of his said ward, and treating the land so purchased as if it belonged to him alone. He, the said Ely, was at this time a minister of the gospel, and had been and was then reputed to be a man of ability and integrity. He had, some time before, married the daughter of Samuel Carswell (sister of Samuel Kinsey Carswell). The said Ely was visionary, unpractical and confiding, and doubtless believed that he was about to realize for himself an immense fortune by his said investments, besides securing the fortune of his ward, which constituted the fund wherewith he made all said investments; but he fell into the hands of the sharpers and designing men in Missouri, who practised their arts upon him until he suddenly found himself in such circumstances as endangered the fortune of his ward, the said Mary Ann Ely Carswell. This happened in the fall of 1837. He was then largely embarrassed, but he supposed himself to be, and was, possessed of property, which, at any fair valuation, would be sufficient to pay his debts. He felt that it was, above all things, incumbent to provide for the debt he owed his ward, and in November, 1837, being ignorant of every legal form, but imagining that he was, without assistance, competent to draft a legal instrument, he, with the intent to provide equitably and fairly for all his creditors, and to consult their real interests, made the deed which is mentioned in the bill of complaint, dated 18th November, 1837. This deed contains many legal solecisms, and in point of law was a nullity, but defendant denies that it was executed with a fraudulent purpose. It is true that it contains provisions upon which law and equity frown, but their insertion flowed from the ignorance of Ely, and from his desire to proceed in his own well-meant, however mistaken and injudicious, mode to provide for the satisfaction of the debts which he owed. After the execution of said deed the said Ely was informed that the same would be ineffectual to carry out his plan of preferring his most meritorious creditors, whereupon he took counsel of the eminent lawyer, Edward Bates, by whose advice, in pursuance of the design of preferring and providing for his orphaned ward, he executed a deed, bearing date January 5, 1838, which is herewith filed, marked (C., deft's. Exh.), wherein, reciting a debt to his ward, the said Mary Ann Ely Carswell, in the principal sum of thirty thousand dollars, with interest for several years, and a debt to the children of Clement Lee Brady, late of Philadelphia, deceased, and that these debts were of peculiar sanctity, he proceeded to convey to Mrs. Margaret Carswell (the grandmother of said Mary Ann Ely Carswell) and Samuel McClellan, an eminent physician of Philadelphia, a large amount of real and personal property, including the tract of

447 acres purchased as aforesaid of Rhodes Gentry, and described as the Gentry farm in the bill of complaint of the complainant, in trust, to secure the payment of the said debts to his said wards within five years from the date of said deed, which deed was duly acknowledged and recorded, and was executed in good faith for the purpose of securing the most sacred claims existing against him, the said Ezra Styles Ely; and conveyed property which, as it afterwards appeared, was unfortunately very insufficient for securing the said claims, though supposed at the time to be fully adequate thereto. And defendant denies that the said deed was made or contrived to delay, hinder, or defraud the creditors of said Ely, but in sincerity and good faith, for a valuable consideration of the most sacred nature, to afford security for a most meritorious debt. And respondent says that the great length of time to elapse before said deed was to be foreclosed was suggested by the tender years of his wards, for whose use and protection it was designed. And this respondent says that at the time when said deed was made the said Ely was indebted to his said wards, Mary Ann Ely Carswell and the children of Clement Lee Brady, in a greater sum, each, than was stated in said deed. That the said Ely did not embrace in the said deed all of the land and property then standing in his name; but that a very large amount of valuable property and lands to him belonging was left out of the operation of said deed of November 18, 1837, which was abandoned as a nullity by the said Ely, embraced upwards of 1200 acres more land than was contained in and conveyed by the said deed of January 5, 1838. And that the said Ely was then, to wit, on the 5th January, 1838, seized of upwards of two thousand acres of land in Marion and adjoining counties in Missouri, besides those mentioned in said deed of January 5th, 1838; and the said respondent avers that it is not true that the said Mrs. Margaret Carswell and Samuel McClellan, or either of them, combined with said Ely, in and by said deed of January 5th, 1838, to defraud the creditors of said Ely, but that the said Mrs. Carswell and Samuel McClellan received the said deed in good faith and unsuspecting confidence, for the use of the beneficiaries thereof, some time after the same was made; the same not being actually delivered to them at the time of its date. That fraud will scarcely be imputed to a ward of nine years old, which was the age of the said Mary Ann Ely Carswell at that time. That the children of Clement Lee Brady were all minors, and residing in Philadelphia, Pennsylvania, at that time; the said deed being made, recorded and kept in Missouri until long afterwards; and that the said Mary Ann Ely Carswell, and the children of the said Clement Lee Brady, were wholly free from all design to hinder, delay, or defraud any one by said deed, and were, indeed, of too tender years to be aware of their rights or of the danger in which they stood.

Respondent further answering says, that on the 2d October, 1843,

the said Mary Ann Ely Carswell became the wife of respondent, a marriage contract being first executed in that behalf between them, whereby all of her estate was conveyed to George Sharswood and Frederick A. Raybold, for the benefit of her and her children of the said marriage. That afterwards, the said Sharswood and Raybold cited the said Ely to account as guardian for the estate of the said Mary Ann Ely Miles. That the accounts filed were referred to an auditor, who reported the said Ely to be in arrear and indebted to the said Mary Ann Ely Miles (late Carswell) in a sum exceeding fifty-six thousand dollars. And that afterwards such proceedings were had that judgment was, by the Orphans' Court of the city and county of Philadelphia, rendered against the said Ely in favor of the said Sharswood and Raybold, trustees of the said Mary Ann Ely Miles, on the 21st day of October, 1846, in the sum of forty-nine thousand eight hundred and sixty-one dollars and fifty-one cents. The said trustees, not caring to protract the litigation for the purpose of contesting a difference of about seven thousand dollars, claimed as a credit by said Ely, although the same was inequitable and invalid, seeing that it was then apparent that there was no earthly likelihood of realizing for the said Mary Ann Ely Miles the amount for which the said Ely was, beyond all controversy, bound, a certified copy of the record of the said proceedings in said Orphans' Court is herewith filed, marked D. (deft's exh.). That in the year 1843, the said Carswell and McClelland, mortgagees in the deed dated January 5, 1838, aforesaid, had taken steps to foreclose said mortgage, and had obtained judgment of foreclosure against the said Ely, under which the said tract of 447 acres of land, purchased from Rhodes Gentry as aforesaid, was sold to them, the said Carswell and McClelland, as trustees for the said Mary Ann Ely Carswell and others, which sale was made by the sheriff of Marion County pursuant to said judgment; and respondent says, that at the time when said judgment was rendered, the debt owing from said Ely to the said Mary Ann Ely Carswell greatly exceeded the sum for which said judgment was rendered. Said judgment was confessed by the said Ely, and was a bona fide step or procedure on his part to provide as well as his means, then greatly impaired, would permit, for the security of the said sacred debts to his wards. A certified copy of the record of the proceedings in said cause is herewith filed, and marked E. (deft's exh.). Also the respondent files herewith, marked F. (deft's exh.), the deed which the sheriff of said Marion County executed to said trustees upon said sale.

That afterwards, to wit, on the eleventh day of November, 1848, the said George Sharswood and Frederick A. Raybold filed their bill in the Court of Common Pleas of the city and county of Philadelphia, in the State of Pennsylvania, against Samuel McClelland and Margaret Carswell, mortgagees in trust as aforesaid, to compel them to convey to whomsoever the court might appoint, all their interest

derived under the said mortgage, and all lands purchased thereunder and held by them in trust for the said Mary Ann Ely Miles and others, and such proceedings were thereupon had, that afterwards, to wit, on the 27th March, 1850, in obedience to a decree of said court, the said Carswell and McClellland conveyed to the said defendant all the said lands and real estate, including the land described in the complainants' bill in this cause. And the defendant brings here and shows to the court a copy of the record of said proceedings resulting in said decree, and the deed made in obedience thereto (G., deft's exh., and H., deft's exh.). Defendant files herewith, and makes part of his answer, the whole of the record of the proceedings in said cause in the Court of Common Pleas for the city and county of Philadelphia, wherein said Sharswood and Raybold were plaintiffs, and Mrs. Carswell and Dr. McClelland defendants, by which the whole of the relations and connection of the said defendants with the trust created by the said deed of January 5th, 1838, will fully appear, and defendant refers to the same as repelling the charge of fraud made against the said Mrs. Carswell and Dr. McClelland in the same manner, and prays that it have the like effect as if the record were here set out and incorporated into this answer. This exhibit is marked G. (deft's exh.).

This respondent further answering admits it to be true, that he, commencing in 1855 an action of ejectment in the Circuit Court of the United States for Missouri, against the said complainant, for part of the land which was thus conveyed to him by the said Carswell and McClelland, in obedience to the decree of court, as aforesaid, did, at the October term thereof, in the year 1856, obtain judgment against the said complainant. And respondent says, that at said trial every material matter and thing now set up in complainant's bill, and relied upon as constituting a ground for equitable relief, was set up by way of defence to the recovery of the said respondent (except the claim for improvements, about which more will be said presently), and respondent says that the jury upon that occasion negatived all the pretences and suggestions and inuendoes of fraud on the part of Mrs. Carswell and Dr. McClelland, which are now repeated and imputed to them on the grounds and for the reason aforesaid, by the said complainant, in his said bill of complaint. And respondent says that the said matters in said bill of complaint contained and set forth were all available (if true) to defeat the said action of ejectment; and the complainant sought, by all available means, to make use of them as such defence to said action of ejectment, and did interpose the said defence fully, and give evidence, the object of which was to establish the same; which evidence so given was encountered and overthrown by other evidence offered by the said respondent, and the jury impanelled in said ejectment suit did decide upon the said evidence and give a verdict thereupon against the said complainant and in favor of said respondent; and

respondent invokes this determination and adjudication of the matters now sought to be tried again on the chancery side of this court, as conclusive and binding on both parties, and as decisive against the right of the complainant to the relief he now seeks.

This respondent denies that the deed of January 5, 1838, referred to in the complainant's bill, was made by E. S. Ely, or contrived by him to defraud, delay, or hinder his creditors. He says that all the property therein named was too little to pay the debts owing to the said Mary Ann Ely Carswell and the heirs of Clement Lee Brady, wards of the said Ezra Styles Ely. That the mention and insertion in said deed of perishable property, of which the amount was very small, was rather inadvertence and want of judgment than any other motive, and that the said Ely did not contemplate, by the making and delivery of said deed, anything but to secure, however imperfectly, the performance of the most sacred obligation resting upon him.

Respondent denies that Mrs. Carswell or Dr. McClelland, in receiving said deed, which was not until some time after it was made and had been recorded, had any fraudulent object or purpose whatever. As persons of business, indeed, their deficiencies were manifold, but inseparable perhaps from their respective conditions, Mrs. Carswell being an aged gentlewoman of upwards of seventy years, and Dr. McClelland being a physician, whose professional engagements confined him to the city of Philadelphia, his place of residence. Nothing but the most complete (and, as it turned out, unfortunate) confidence on their part, not only in the integrity, but the business capacity and judgment of Ezra Styles Ely could have induced them, or either of them, to accept a trusteeship of the nature created by said deed of January 5, 1838, and they were undoubtedly negligent of their duties as trustees so far as to render themselves responsible to the beneficiaries of said trust; but there was nothing in their acts and intentions which was fraudulent, or even detrimental as against the rest of the world.

As to all that is stated in the bill of complaint of the complainant respecting the consent, acquiescence, and understanding of the said Ezra Styles Ely in and to the illegal, irregular, and void proceedings by which the mortgage upon the Gentry farm, held by the said Gallaher, was supposed to be foreclosed, this respondent submits that the same is essentially of the nature of flummery and rubbish, seeing that the title to real estate in the State of Missouri is not changed, does not vest, and is not divested by any such pretenees; and that no one, by "recognizing as valid" that which has no validity, can confer upon it any greater legal force or effect than it would enjoy independent of such recognition; and that in particular will such forms of recognition be inoperative to cut out bona fide mesne incumbrances for value, such as the beneficiaries of the deed of January 5, 1838, above cited. And respondent states and charges that

the six shares of the Jefferson Medical College stock which said Ely paid to the said Gallaher, and which the said Gallaher received as part payment for said judgment, were, at the time of said payment, the property of the said Mary Ann Ely Carswell, afterwards the wife of this respondent, and that the purpose and object of the said Ely in making the contract set out in complainant's bill, marked Exhibit 5, and in appropriating the said stock of said Mary Ann Ely Carswell to the redemption of said land from the said mortgage to Gallaher, could only have been, and actually were, to preserve the same for the benefit and advantage of the said Mary Ann Ely Carswell; and that to impute to him any other or different intention and purpose is to make him, the said Ely, a knave, and a betrayer of trust of unimaginable proportions, which this court will not gratuitously do.

Respondent denies that the said Gallaher was entitled, in the autumn of the year 1846, to a balance of nine hundred and fifty-five dollars and ninety-one cents on said mortgage. He avers that the said Gallaher had, by virtue of divers execution-sales against the said Ely, realized and appropriated to the payment of said mortgage debt large sums of money, which either extinguished said mortgage debt (which respondents believes and charges to have been the case), or else left the merest trifle to be paid towards its complete satisfaction and extinction. That the confession of judgment upon said mortgage debt was, as to the premises mortgaged, a mere nullity; that all the costs attendant thereon are in nowise chargeable in the said premises; and that the compounding of the interest and principal effected by that little arrangement was and is, as to the mesne incumbrancer of said premises, at least, a nullity. That the moneys realized by said Gallaher upon his executions, issued on the judgment confessed in his favor as aforesaid by the said Ely, were obtained by sales of the lands of the said Ely. That the said Gallaher was in many instances the purchaser of said lands. That he either obtained the sheriff's deeds therefor, or he did not. If he did not, it was his own fault and folly, and should be and will be held to be his own loss. If he did, he holds the land on such title as the sheriff could sell under such execution; to all which sales the maxim *caveat emptor* applies in an especial manner and degree. And even if said Ely had been willing and ready to accept a reconveyance of said lands, or a release of his bid for them, from said Gallaher in consideration of the cancellation of a credit upon said mortgage debt, yet said respondent denies that any such reconveyance or release was in fact made by said Gallaher, or that any such release or reconveyance could be made for the purpose of cancelling a credit on the mortgage debt to the prejudice of the mesne incumbrancer, afterwards the wife of the respondent. And respondent says that said Mary Ann Ely Carswell was not merely the incumbrancer, but, by virtue of the facts above herein set forth, the

purchaser of said land, or the redemptioner thereof; having paid towards the extinguishment of the mortgage debt more than eight times as much, since the 1st January, 1841, as the land sold for during that year at sheriff's sale.

But respondent trusts that no suggestion that said Gallaher, though a purchaser of the lands of said Ely under said judgment, so confessed by said Ely, neglected or abstained from taking the sheriff's deed therefor, will be listened to in answer to the return of the sheriff, that so much money was made and paid to said Gallaher, or held by him ready to be so paid. For the history of this very case furnishes a proof that the said Gallaher may at any time procure such sheriff's deed; for, under the allegation and pretence, in the year 1848, that Samuel T. Glover and Carty Wells had, at a sale had in the year 1848, under the foreclosure of the said deed of mortgage, dated January 5th, 1838, purchased a piece of land described therein, within the town of Palmyra, containing twelve $\frac{1}{8}\frac{1}{0}$ acres of land, and worth at the time at least six thousand dollars, for the price and sum of twelve dollars and fifty cents, although there was no mention in the return of the sheriff of any such sale or purchase, or of the money supposed to have been bid therefor, the Circuit Court of Marion County, Missouri, allowed the ex-sheriff years after the expiration of his term of office, upon an ex parte motion, to amend his return, or rather to make a new return for the occasion, and thereupon to execute a deed to the said Wells & Glover, which the Supreme Court of the State of Missouri has since that time (vide 19 Mo. Rep., 408) pronounced to be unimpeachable. And therefore respondent submits that, inasmuch as fifty-five years of delay can be no cause for refusing such a deed if five years delay be not such a cause, there can be no legal reason why said Gallaher should not come into court at any time and claim to have executed to him sheriff's deeds for any lands the sale of which to him yielded the money made by the sheriff upon the executions aforesaid. And respondent reiterates his denial that any such sum as nine hundred and fifty-five dollars ninety-one cents remained due upon said mortgage debt, in 1846, to the said Gallaher.

And the said respondent says that the said Patterson, in conducting the redemption of said land from said Gallaher, acted as, and was the mere agent of, the said Ezra Styles Ely, and that he had full knowledge of all the premises, and of the payment of the stock of the said Mary Ann Ely Carswell to the said Gallaher in satisfaction of said mortgage debt, and of the amounts realized by the said Gallaher by the sale of the lands of the said Ely (who was the father-in-law of the said Patterson), and of the incumbrance of the said January 5th, 1838. And that the said Patterson could not in any case have or hold any further interest or estate in said land than the said Ezra Styles Eli himself had or could obtain; and that if the said Patterson paid any money to the said Gallaher towards

the extinguishment of said mortgage, the same was furnished to him by the said Ely. And that if the said Patterson united with the said Ely, and confederated with him to practise a fraud upon the said Mary Ann Ely Carswell and others, as must be the case if the theory of complainant be correct, then said fraud was visible, notorious, gross, and palpable on the face of the papers placed on record in relation to this "Gentry Farm" before the plaintiff acquired any title thereto; and neither he nor any one else can come into a court of equity and ask its aid to polish and refine such an iniquity into a "perfect title." Respondent submits that a bill to give to the complainant peace, or dissipate a cloud on his title, is not allowed in favor of one who thus speculates; and that the subsequent purchase by the complainant's vendor of all the interest of the said Ely in and to said land is only so far material as it furnishes evidence of the consciousness of the said purchaser of the invalidity of the title by which he held said Gentry Farm, and of his anxiety to bind together a number of rotten twigs into a bundle possessing some semblance of strength, which might, peradventure, deter the rightful owner from any testing of their real character. And respondent submits that by the very tenor of a deed under and through which the said complainant seeks to set up title to the premises in controversy, namely, the deed dated October 31, 1846, executed by the said James Gallaher to the said James H. Patterson, the full payment of the said mortgage debt to the said Gallaher is expressly recited and declared; and it thence results that the said Carswell and McClellan, purchasers of the said land under the mortgage of 5th January, '38, were the persons clothed with the perfect and unincumbered title thereto, for the benefit of the heirs of the said Clement Lee Brady, and the said Mary Ann Ely Carswell; and of this the said Patterson, and all persons claiming under him, had due and full notice.

Respondent denies that said complainant has any equity, by reason of any improvements put upon said lands by him, to relief in this court. Nor is the form and structure of his bill such as, in any event, to entitle him to any allowance for such improvements, even had they been made in good faith, and had the complainant been a bona fide purchaser for value of said land. That the complainant exhibits himself in this court as a sturdy and clamorous mendicant for protection to a hardy speculation, made with full knowledge of the risks to be encountered. He shows himself to have taken possession of the land (the title to which he demonstrates to have been patched up after his purchase from Tatlow, and before, as it seems from his narrative, that he confided sufficiently to Tatlow's warranty deed, to venture to make any improvements upon said land), and to have made ordinary improvements upon it, and has been in the pernancy of the rents and profits, and his predecessor has been in such pernancy before him, for upwards of ten years, during which the rightful owners have been by them kept out of possession. Respon-

dent submits that the complainant cannot avail himself of any expenditures made in such improvements, to entitle him to any relief in a court of equity; and moreover, respondent does not know anything in relation to the truth of the averments made in said bill of complaint touching said improvements; and so far forth as they may be considered by the court to be material to any issue rightfully made in this trial, the respondent prays that complainant be held to make strict proof thereof.

Respondent submits, that the full payment of the mortgage debt secured by the said deed of November, 1837, by the said Ezra Styles Ely to the said James Gallaher, was expressly, pointedly, and emphatically, put in issue and tried between the said complainant and this respondent in a cause lately on the law side of this court pending in ejectment, wherein this respondent was plaintiff, and the said complainant was defendant, and wherein the said tract of land in complainant's bill mentioned and described was recovered by the said respondent. That the jury in said ejectment suit impanelled, decided and determined the said issue in favor of the said respondent, and found that the whole of said mortgage debt was paid, satisfied, and extinguished, by the said Ezra Styles Ely, and no other person. All of which will more fully and at large appear by reference to the record of said judgment and the proceedings conducing to the same in said court remaining. Wherefore the respondent submits, that complainant is estopped to say that the said Ezra Styles Ely did not fully pay and satisfy the said mortgage debt to said Gallaher; and respondent further answering, says, that at the time when, as alleged by the said complainant, in his said bill of complaint, the said Ezra Styles Ely made a deed of conveyance and release of the premises, in the said bill of complaint mentioned, to the said Thomas H. Tatlow, to wit, on the 1st January, 1850, the said Ely was much shaken in strength of mind and body, and subject to the influences of those around him, whether rightly or wrongly exerted; and that the said deed, dated 1st January, 1850, was obtained from the said Ely by the undue influence of his son-in-law, James H. Patterson, in combination with the said Thomas H. Tatlow and complainant, for the purpose of patching up the case, which said complainant, said Tatlow and said Patterson, then meditated and sought to accomplish to the defeat of the rightful claims of the said Mary Ann Ely Carswell and the children of Clement Lee Brady, against and upon the said land: and that the said Tatlow, Patterson, and complainant, in procuring said deed, combined and confederated, knowingly and wickedly, to defeat the title and defraud the rights of the said Mary Ann Ely Carswell, then the wife of the said Thomas J. Miles, respondent, and the children of Clement Lee Brady, and for that purpose abused the confidence and imposed on the feebleness of the said Ezra Styles Ely, who was then too infirm to resist their machinations; and respondent submits, that the plain-

tiff is for this reason, among so many others hereinbefore respectfully stated, in no position to invoke the aid of a court of equity. And respondent denies all, and all manner of unlawful and corrupt combination and confederacy against the said Mrs. Margaret Carswell, and the said Dr. Samuel McClellan, together with the said Ezra Styles Ely, in said bill of complaint charged: without this, that there is any other matter, cause or thing, in the said complainant's bill of complaint contained, material or necessary for this respondent to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge or belief of this respondent; all which matters and things this respondent is willing and ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges, in this behalf most wrongfully sustained.

THOS. T. GANTT,
Solicitor for Respondent.

Thomas J. Miles, respondent, being duly affirmed, says, on his affirmation, that he verily believes the aforegoing answer and the matters and things therein stated are true. That, in so far as the matters and things therein stated are declared to be within his own knowledge, he knows the same to be true; and so far as the same are therein stated to be derived from the information of others, he believes them to be true.

THOS. J. MILES.

Affirmed and subscribed before me, a commissioner for the State of Missouri, residing in said city of Philadelphia, have hereto set my hand and seal, this fifth day of April, 1858.

NOTE.—The word sworn, twice erased; and the word affirmed, twice interlined; and the word affirmation, interlined.

EDW. SHIPPEN,
A Com. for Missouri.

And afterwards, viz., on the 13th day of April, 1858, at a Circuit Court, in and for said district, the following order was made:

*Complainant's Replication Filed.*

WILLIAM D. CALDWELL, complainant,
*v.*
THOMAS J. MILES, defendant.
} In Chancery.

This day comes complainant, by his solicitor, and files his replication to the answer of the defendant filed herein.

The following is a copy of the replication:

*Replication.*

In Circuit Court, United States, District Missouri. April Term, 1858.

WM. D. CALDWELL
*v.*
THOS. J. MILES.

And now at this day comes the complainant, by his solicitor, and for replication to the defendant's answer says, that the allegations in the bill are true, and the allegations of the defendant's answer and the many statements therein are not true, but false, and this the complainant is ready to verify.

S. T. & A. D. GLOVER,
For Complainant.

And afterwards, to wit, on the 22d day of October, 1858, at a Circuit Court, in and for said district, the following order was made:

*Agreement taking Testimony, Filed.*

WILLIAM D. CALDWELL, complainant,
*v.*
THOS. J. MILES, defendant.
In Chancery.

This day come the parties, by solicitors, and file an agreement in writing, agreeing that testimony may be taken to be used in the hearing of this cause, until within twenty days of the next term of this court, and consenting to the continuance of this cause, until the next term of this court.

And afterwards, viz., on the 28th day of April, 1858, at a Circuit Court, in and for said district, the following order was made:

*Further Time for Hearing.*

WILLIAM D. CALDWELL, complainant,
*v.*
THOMAS J. MILES, defendant.
In Chancery.

By consent of solicitors for complainant and defendant, it is ordered that this cause be continued until the next term of this court, and further time until the first day of the next term is allowed to both parties to take testimony to be used in the hearing of this cause.

And afterwards, viz., on the 13th day of April, 1860, at a Circuit Court in and for said district, the following order was made:

*Cause set down for Hearing instanter.*

WILLIAM D. CALDWELL, complainant,
*v.*
THOMAS J. MILES, defendant. } In Chancery.

This day come the parties by solicitors, and by consent, it is ordered, that this cause be set down for hearing instanter, and both parties being ready, the hearing upon bills, answer, replication, exhibits, and depositions commenced, but not being concluded at the hour of adjournment, further proceedings are continued over until to-morrow morning.

Afterwards, viz., on the 14th day of April, 1860, at a Circuit Court in and for said district, the following order was made:

WILLIAM D. CALDWELL, complainant,
*v.*
THOMAS J. MILES, defendant. } In Chancery.

This day come again the parties, by solicitors, and the hearing of this cause was resumed and continued till the hour of adjournment, but not being concluded, the further hearing was continued over, until Friday, the 20th inst.

And afterwards, viz., on the 20th day of April, 1860, at a Circuit Court in and for said district, the following order was made:

WILLIAM D. CALDWELL, complainant,
*against*
THOMAS J. MILES, defendant. } In Chancery.

This day come again the parties by solicitors, and the hearing of this cause was resumed and continued, but not being concluded at the hour of adjournment, further proceedings are continued over until Tuesday morning next.

Afterwards, viz., on the 24th day of April, 1860, at a Circuit Court in and for said district, the following order was made:

WILLIAM D. CALDWELL, complainant,
*against*
THOMAS J. MILES, defendant. } In Chancery.

This day come again the parties by solicitors, and the hearing of this cause was concluded and submitted to the court for a decree.

And afterwards, to wit, on the 26th day of April, 1860, at a Circuit Court in and for said district, the following order was made:

*Decree of Perpetual Injunction.*

WILLIAM J. CALDWELL, complainant,
*against*
THOMAS J. MILES, defendant. } In Chancery.

This cause comes on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz., that the injunction heretofore granted in this cause be and the same is hereby made perpetual, and the defendant Miles be and he is hereby enjoined and restrained from proceeding further toward the enforcement of the judgment at law, rendered by this court on the 28th day of October, 1856, in favor of the defendant, and against the complainant in this cause, for the possession of the land there sued for, and damages and costs.

And it was further ordered, adjudged, and decreed that the defendant Miles, and all persons claiming under him, be enjoined and restrained from ever setting up or claiming title to the land in the bill described, by virtue of or under the deed of mortgage from Ezra Stiles Ely to Margaret Carswell and Samuel McClelland, in said bill mentioned. And it was further ordered, adjudged, and decreed that the defendant Miles pay the costs of this suit and of the suit at law hereby enjoined, and that execution issue for such costs.

And afterwards, to wit, on the 27th day of April, 1860, at a Circuit Court in and for said district, the following order was made:

*Appeal allowed.*

WILLIAM D. CALDWELL, complainant,
*against*
THOMAS J. MILES, defendant. } In Chancery.

This day comes again the defendant, by solicitor, and on his motion and appeal is allowed said defendant to the Supreme Court of the United States from the decree rendered herein, and said defendant is allowed until the first day of June next to execute appeal bond, said bond to be in the penal sum of five hundred dollars, and to be approved by one of the judges of this court.

The following is a copy of the Appeal Bond:

*Appeal Bond.*

Circuit Court of the United States for the Districts of Missouri.

WILLIAM D. CALDWELL
*v.*
THOMAS J. MILES. } On Appeal.

Know all men by these presents that we, Thomas J. Miles as principal, and Thomas T. Gantt as surety, are held and firmly bound unto William D. Caldwell in the sum of five hundred dollars, and for the payment of which, well and truly to be made, we bind ourselves jointly and severally, and our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated this 25th day of May, A. D. 1860.

Whereas, Thomas J. Miles, on the twenty-seventh day of April, A. D. 1860, prayed an appeal in the above-entitled cause to the Supreme Court of the United States to reverse the decree rendered on the twenty-sixth day of April, A. D. 1860, in said cause by the Circuit Court of the United States for the Districts of Missouri.

Now, therefore, the condition of this obligation is such that if the above-named Thomas J. Miles shall well and truly prosecute the appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

THOS. J. MILES. [L. S.]
THOS. T. GANTT. [SEAL.]

Signed and sealed by Thomas J. Miles, in presence of
A. T. GOODMAN,
GOODE B. MEANS.

Acknowledged by Thomas T. Gantt before me, and by me approved on this the 30th day of May, A. D. 1860.

SAMUEL TREAT,
Judge of the United States District for the Eastern District of Missouri.

The following is a copy of the agreement signed by the counsel, and filed in this cause:

*Agreement of Counsel as to Contents of Transcript.*

WM. D. CALDWELL
*v.*
THOMAS J. MILES. }

In the United States Circuit Court for the District of Missouri.

It is ordered by the court that a transcript of the bill, answer, and replication, and the evidence of the parties, be transmitted to

the Supreme Court, that is to say, copy of the bill, answer, and replication.

The several exhibits named in the bill, each in its order, except Exhibit No. 1.

The several exhibits named in the answer, each in its own order, except such as have already been copied.

The depositions read on the part of the complainant, viz.:

John Nichols's deposition.
William A. Foster's "
D. G. Davanport "
William Sair "
Cacey Fooman "
Allen G. Gallaher "
William Fooman "
James Patterson's "

and Exhibits A., B., and C.

Mary Ann M. Patterson deposition and exhibit, being McClelland's letter.

William Muldron's deposition.

Power of attorney from Mr. Carswell to Dr. Ely.

Power of attorney from Dr. McClelland to Dr. Ely.

The depositions read on the part of the defendant, viz.:

Jonathan Jno. Robinson deposition.
M. McGronnen "
J. B. Southerland "
John R. Vogdes "
George Sharswood "
Robert Steel "
J. A. Philips "
Margaretta Lamb "
William Nassau "
John W. Greer "
Samuel Miles "
M. J. Robinson "

The letters of Dr. Ely, attached to the batch containing the above depositions, were not read, and will not be inserted.

The transcript of the record of Southern *v.* Caldwell.

The mortgage from Ely to Mrs. Carswell.

The record of the ejectment suit, Miles *v.* Caldwell, de'ied October 7, 1856.

It was admitted by both parties that, at the trial of said ejectment suit, the deed of mortgage of Ely to Carswell and McClelland, dated Jan. 5th, 1838, was impeached for fraud, and upon the question then made before the jury, the court gave the following instructions:

Here insert all the instructions given to the jury in said ejectment suit, May 6th, 1859.

GLOVER & RICHARDSON,
For Complainant Caldwell.

GANTT,
For Miles.

The following are the exhibits referred to in the foregoing agreement:

*Exhibit No. 2, referred to in Bill of Complainant. Mortgage Deed, Ely to Gallaher.*

State of Missouri, County of Marion, *ss.* In the Recorder's Office.

Know all men by these presents that I, Ezra Styles Ely, D. D., of West Ely, in Marion County, in the State of Missouri, am indebted to the Rev. James Gallaher in the sum of two thousand eight hundred and sixty-six dollars and ninety-seven cents, for the payment of which sum, together with eight per cent. interest on the same, payable in two years from the date of this instrument, I have executed to him my note of hand, and, the more perfectly to secure to him the discharge of this debt, I, the said Ely, hereby bargain, sell, and convey to the said James Gallaher, his heirs, executors, administrators, and assigns, forever, all that certain tract of land, situate in Marion county, which Rodes Gentry and wife conveyed to me, the said Ely, by deed recorded in the proper office at Palmyra, in Deed Book 6, pages 417 and 418, except fifteen acres, which I have sold to Benjamin Pyatt, Alexander J. Dallas, and J. C. Beaty, together with all the houses thereon erected, and all the appurtenances of the same, which tract of land is known as the northeast quarter of section No. 21, out of which fifteen acres as abovesaid are excepted; the east half of the northwest quarter of section No. 21, except thirty acres on the south side of this lot, conveyed by Rodes Gentry to Moses Gentry; the west half of the northwest quarter of section No. 21; the east half of the northeast quarter of section No. 20, except three acres on the south end of said lot, granted for the use of a meeting-house, and the west half of the southwest quarter of section No. 21, these portions being in township 57, and range 6, west of lands sold at Palmyra, in Missouri; that he the said Gallaher, and heirs and assigns, may have and hold the premises hereby granted forever.

Nevertheless, the condition of this bargain and sale is such, that if the said Ely, or his heirs or assigns, shall well and truly pay to the said Gallaher, or his heirs or assigns, two thousand eight hundred and sixty-six dollars and ninety-seven cents, with interest as aforesaid, on or before the expiration of two full years from this eighteenth day of November, A.D. 1837, then this deed of mort-

gage shall become and forever remain null and void, otherwise, it shall be and continue forever in force, and shall constitute good and sufficient conveyance of the property above described.

In witness whereof I have hereunto set my hand and seal on the day and date above written.

E. S. ELY, [SEAL.]

State of Missouri, County of Ralls, *ss.*

Be it remembered, that on the twenty-second day of November, A.D. 1837, before me, William Forman, Esq., one of the justices of the County Court in and for the county of Ralls, personally came the Rev. Ezra Stiles Ely, D.D., known to me to be the person whose name is subscribed to the foregoing instrument of writing, as having executed the same, and acknowledged the same to be his act and deed, hand and seal, for the purposes therein mentioned.

WILLIAM FORMAN, [SEAL.]
J. C. C.

Filed for record on *the* this 4th day of December, 1837.

STANTON BUCKNER,
Recorder.

State of Missouri, County of Marion, *ss.*

I, Thomas E. Thompson, clerk of the Circuit Court, and ex-officio recorder in and for said county of Marion, certify that the foregoing is a true and full copy of an instrument of writing now remaining of record in my said office, in book "E.," for recording conveyances, &c., at pages 374 and 375, as fully as the same remains of record, as aforesaid.

In testimony whereof I hereto set my hand and affix my [L. S.] official seal; done at office, in Palmyra, in the county aforesaid, this 30th April, 1851.

THOS. E. THOMPSON,
Clk. Cir. Ct. and Ex-officio Recorder.
By his Deputy, BENJ. F. HAYDEN.

*Exhibit No.* 3, *referred to in the Bill of Complaint.*

State of Missouri, County of Marion, *ss.*

In the Marion Circuit Court.

Be it remembered, that heretofore, to wit, on the 5th day of May, 1841, it being during the May term, 1841, of said court, a petition was filed in open court, in the words and figures following, to wit:

*Petition on Note.*

State of Missouri, County of Marion, *ss.*

In the Marion Circuit Court, May Term, 1841.

To the Marion Circuit Court:

James Gallaher, plaintiff, states, that he is the legal owner of a note against the defendant Ezra Stiles Ely, to the following effect:

WEST ELY, MARION COUNTY, MISSOURI, Nov. 18th, 1837.

$2866\frac{97}{100}$

Two years after date, I promise to pay to Rev. James Gallaher, or order, twenty-eight hundred and sixty-six dollars and 97 cents, without defalcation, for value received, with eight per cent. interest per annum from date.

E. S. ELY.

Yet the debt remains unpaid; therefore he demands judgment for his debt and damages for the detention of the same, together with costs.

JAMES GALLAHER.

Upon which said petition appears the following indorsement:

*Confession of Judgment.*

I, Allen G. Gallaher, hereby confess a judgment upon the above note and petition for the sum of $2866 97 cents debt, and $365 58 cents damages, with eight per cent. on the same from date.

Witness my hand and seal on this 5th May, 1841.

ALLEN G. GALLAHER. [SEAL.]

Attached to which said petition is a note in the words and figures following, to wit:

*Copy of Note.*

WEST ELY, MARION COUNTY, MO., Nov. 18th, 1837.

$2866\frac{97}{100}$

Two years after date, I promise to pay to Rev. James Gallaher, or order, twenty-eight hundred and sixty-six dollars and ninety-seven cents, without defalcation, for value received, with eight per cent. interest per annum from date.

E. S. ELY.

Upon which said note are the following indorsements, to wit:

Received March 14th, 1839, of E. S. Ely $229\frac{35}{100}$ interest on the within to Nov. 18th, 1838.

JAMES GALLAHER.

Received, Dec. 27th, 1839, interest in part, amounting to one hundred and ninety-seven dollars and 73 cents. $197\frac{73}{100}$

JAMES GALLAHER.

And afterwards, to wit, on the 5th day of May, A.D. 1841, before the Hon. Priestly H. McBride, at a Circuit Court, continued and held at the court-house in the town of Palmyra, in and for the county of Marion, it being during the May term, 1841, of said court, the following among other proceedings were had, to wit:

*Judgment.*

JAMES GALLAHER, plaintiff,
*v.*
EZRA STILES ELY, defendant. } Pet. in Debt.

And now at this day come the plaintiff aforesaid, by his attorney, and filed his petition herein, and also the defendant, by Allen G. Gallaher, his attorney, and confesses the plaintiff cause of action for the sum of two thousand eight hundred and sixty-six dollars and ninety-seven cents debt, and three hundred and sixty-five dollars, and fifty cents damages; therefore, it is considered by the court that the said plaintiff do have and recover against the said defendant the said sum of two thousand and eight hundred and sixty dollars and ninety-seven cents, the debt in said petition mentioned, and three hundred and sixty-five dollars and fifty-eight cents damages for the detention thereof, together with his costs by him about his suit in this behalf expended; and that he may have thereof his writ of execution. This judgment is to bear eight per cent. interest until paid. And afterwards, to wit, on the 20th day of October, 1841, there was issued from the office of the clerk of the Marine Circuit Court an execution in the words and figures following, to wit:

*Execution.*

State of Missouri, County of Marion, *ss.*

The State of Missouri to the Sheriff of Marion County, greeting:

Whereas James Gallaher, on the 5th day of May, in the year of our Lord eighteen hundred and forty-one, at our Circuit Court for said county of Marion, hath recovered against Ezra Stiles Ely for debt, the sum of two thousand eight hundred and sixty-six dollars and ninety-seven cents, and the sum of three hundred and sixty-five dollars and fifty-eight cents, which to said James Gallaher were adjudged for his damages by reason of the detention of said debts, and also the sum of two dollars and thirty-eight and $\frac{3}{4}$ cents cost. These are therefore to command you that, of the goods and chattels

and real estate of the said Ezra Stiles Ely, you cause to be made the debt, damages and costs aforesaid, and that you have the same before the judge of our said court on the first Monday in January next, to satisfy the said debt, damages and costs, and that you have then there this writ certifying how you have executed the same.

Witness Stanton Buckner, clerk of our said court, and the [SEAL.] seal thereof; done at office in Palmyra, at the county aforesaid, on this 20th day of October, 1841.

STANTON BUCKNER,
Clerk.

Upon said writ is the following indorsements, to wit:

Received this writ, October 20th, 1841.

J. J. MONTGOMERY,
Sheriff M. C.

The sheriff will suspend the sale in the case of Gallaher *v.* Ely, by order of plff.

JAMES GALLAHER.

Jan. 8th, 1842.

Returned, by order of plaintiff, sheriff's fee, $1 00.

J. J. MONTGOMERY,
Sheriff M. C.

And afterwards, to wit, on the 11th day of April, A.D. 1842, there was issued from the office of the clerk of the Circuit Court another execution in the words and figures following, to wit:

*Execution.*

State of Missouri, County of Marion, *ss.*

The State of Missouri to the sheriff of Marion County, greeting:

Whereas James Gallaher, on the 5th day of May, in the year of our Lord eighteen hundred and forty-one, at our Circuit Court for said county of Marion, hath recovered against Ezra Stiles Ely, for debt, the sum of two thousand eight hundred and sixty-six dollars and ninety-seven cents, and the sum of three hundred and sixty-five dollars and 58 cents, which to the said James Gallaher were adjudged for his damages, by reason of the detention of said debt, and also the sum of four dollars and 38¾ cents costs. These are therefore to command you that of the goods, chattels, and real estate of the said Ezra Stiles Ely you cause to be made the debt, damages, and cost aforesaid, and that you have the same before the judge of our said court on the first Monday in May next to satisfy the said debt, damages, and costs, and that you have then and there this writ, certifying how you have executed the same.

Witness John P. Rutter, clerk of our said court, and the seal [SEAL.] thereof; done at office at Palmyra, at the county aforesaid, on the 11th day of April, A.D. 1842.

JOHN P. RUTTER,
Clerk.

Upon which said execution are the following indorsements, to wit:

Received this writ April 11th, 1842.

J. J. MONTGOMERY,
Sheriff M. C.

Received, on the within execution, fourteen dollars and $\frac{64}{100}$, in full, of Buckner's, Rutter's, and Montgomery's costs in this execution up to day of sale, also two dollars in full of deed to Montgomery per the hands of Allen Gallaher, this Nov. 1st, 1844.

J. J. MONTGOMERY,
Ex-off. Sheriff M. C.
By defendant B. B. KING.

Received one dollar, my fee in the case, Nov. 1st, 1844, to date of sale, Sept. 12th, 1842.

J. P. RUTTER.

Attached to said execution is the following notice:

*Notice of Sale.*

Sheriff's Sale.

In virtue and by authority of an execution issued from the office of the clerk of the Circuit Court of the county of Marion, Missouri, and to me directed, in favor of James Gallaher against Ezra Stiles Ely, I have levied upon and seized all the right, title, interest, and claim of the said Ely in the following described real estate, to wit: The N. E. qr. of section No. 21 (except 15 acres); the E. ½ of the N. W. qr. of sec. 21 (except thirty acres on the south side of said quarter); the W. ½ of the N. W. qr. of sec. 21; the east ½ of the N. E. qr. of sec. 20 (except 3 acres on the south end of said last-named lot); the W. ½ of the S. W. qr. of sect. 21, all in township 57, and of range 6 west; all lying and being in the county and State aforesaid, together with the buildings and improvements thereunto belonging, and will sell the same (subject to all prior liens and judgments) to the highest bidder for ready money at the court-house door in the town of Palmyra, in the county and State aforesaid, on Monday the 12th day of September next, between the hours of nine and five o'clock of that day, to satisfy said execution and costs.

J. J. MONTGOMERY,
April 12th, 1842. Sheriff, Marion County.

Indorsed on which said notice appears the following sheriff's return:

*Sheriff's Return.*

State of Missouri, County of Marion, *ss.*

I certify that by virtue of the annexed execution, I levied upon the property mentioned in the within advertisement, which is to be taken and considered as a part of my return, and exposed the same to sale on the 12th of September, 1842, before the court-house door in the town of Palmyra, county aforesaid, during the term of the Circuit Court of said county, having previously given twenty days' notice of the time and place of sale, and what real estate was to be sold and where situated, by six handbills, signed by me and put up in public places in different parts of the county, and James Gallaher being the highest bidder, became the purchaser thereof at the sum of three hundred and thirteen dollars and 50 cents, to wit: for the N. E. qr. sec. 21 (except 15 acres), one dollar per acre; for the E. ½ of the N. W. qr. of sec. 21 (except 30 acres on the south side of said qr.), fifty cents per acre; for the W. ½ of the N. W. qr. of sec. 21, fifty cents per acre; for the E. ½ of the N. E. ½ of section 20 (except 3 acres on the south end said last-named lot), fifty cents per acre; and for the W. ½ of the S. W. qr. of sec. 21, fifty cents per acre; all in township 57, and of range 6 west, lying in the county aforesaid, amounting in the aggregate to the aforesaid sum of three hundred and thirteen dollars and fifty cents, which, after deducting the clerk's and sheriff's costs (to wit), fourteen dollars and sixty-four and three-fourths cents, entitles the annexed execution to a credit of two hundred and ninety-eight dollars and eighty-five and a fourth cents.

J. J. MONTGOMERY,
Sheriff M. C.

And afterwards, to wit, on the 26th day of July, 1843, there was issued from the office of the clerk of the Circuit Court an execution, directed to the sheriff of Marion county, in the words and figures following, to wit:

*Execution.*

State of Missouri, County of Marion, *ss.*

The State of Missouri to the sheriff of Marion County, greeting:

Whereas James Gallaher, on the 5th day of May, in the year of our Lord eighteen hundred and forty-one, at our Circuit Court for said county of Marion, recovered against Ezra Stiles Ely, for debt, the sum of two thousand eight hundred and sixty-six dollars and ninety-seven cents, and the sum of three hundred and sixty-five dollars and 58 cents, which to the said James Gallaher were adjudged

for his damages, by reason of the detention of said debt, and also the sum of one dollar and cents costs. These are therefore to command you that of the goods and chattels and real estate of the said Ezra Stiles Ely you cause to be made the debt, damages, and costs aforesaid, and that you have the same before the judge of our said court on the first Monday in November next, to satisfy said debt, damages, and costs, and that you have then there this writ, certifying how you have executed the same.

Witness John P. Rutter, clerk of our said court, and the [SEAL.] seal thereof; done at office in Palmyra, at the county aforesaid, on this 26th day of July, A.D. 1843.

JOHN P. RUTTER,
Clerk.

Upon which said execution are the following indorsement, to wit:

Received this writ July 26th, 1842.

J. J. MONTGOMERY,
Sheriff M. C.

Attached to said execution is the following notice, to wit:

*Notice of Sale.*

Sheriff's Sale.

In virtue and by authority of an execution issued from the office of the clerk of the Circuit Court of the county of Marion, Missouri, and to me directed, in favor of James Gallaher against Ezra Stiles Ely, I have levied upon and seized all the right, title, interest, and claim of the said Ely in and to the following described real estate, to wit: The E. ½ of the N. E. qr. of section 21, in township No. 57 north, and of range 6 west. The west half of the N. W. qr. of section No. 21, in township No. 57 north, and of range No. 6 west. The east half of the N. W. qr. of section 21, in township No. 57 north, of range 6 west. The W. ½ of the N. W. qr. of section 21, in township No. 57 north, and of range 6 west. The E. ½ of the N. E. qr. of *of* section 20, in township No. 57 north, and of range 6 west. The N. W. qr. of section 27, in township No. 57 north, and of range 6 west. The whole of section 28th, in township No. 57 north, and of range 6 west. The N. E. qr. of section 22, in township *in township* No. 57 north, and of range 6 west. The N. W. qr. of section 23, in township No. 57 north, and of range 6 west. The N. ½ of section 34, in township 57 north, and of range 6 W. Section 33, in township No. 57 north, and of range 6 west. The S. ½ of section 27, in township No. 57 north, and of range 6 west. The S. W. qr. of section 7, in township No. 58 north, and of range 7 west. The S. ½ of section 20, in township No. 59 north, and of range 5 west. The S. ½ of section 8, in township No. 59 north, and

of range 5 west. The S. W. qr. of section 9, in township No. 59 north, and of range 5 west. The E. ½ of the N. W. qr. of section 16, in township No. 57 N., and of range 6 west. ½ of the S. E. qr. of section 4, in township No. 57 north, and of range 6 west. The E. ½ of the S. W. qr. of section 21, in township No. 57 north, and of range 6 west. The S. E. ¼ of the S. E. qr. of section 26, in township No. 57 north, and of range 7 west. The E. ½ of the N. E. qr. of section 27, in township No. 57 north, and of range 7 W. The W. ½ of the S. W. qr. of section 26, in township No. 57 north, and of range 7 west. The W. ½ of the N. W. qr. of section 36, in township No. 57 north, and of range 7 west. The E. ½ of the S. E. qr. of section 20, in township No. 57 north, and of range 6 west. The N. E. ¼ of the N. E. qr. of section 29, in township No. 57 north, and of range 6 west.

The N. ½ of section 15, in township No. 57 north, and of range 6 west. The E. ½ of the S. E. qr. of section 17, in township No. 57 north, and of range 6 west. The E. ½ of the N. W. qr. of section 16, in township No. 57 north, and of range 6 west. The N. W. qr. of section 25, in township No. 57 north, and of range 8 west. The S. ½ of section 21, in township No. 57 north, and of range 8 west. The N. ½ of section 21, in township No. 57 north, and of range 8 west. The N. ½ of the S. E. qr. of section 28, in township No. 57 north, and of range 7 west. The S. E. qr. of section 24, in township No. 57 north, and of range 8 west. The whole of section 17, in township No. 59 north, and of range 5 west. The N. ½ of section 20, in township No. 59 nor., and of range 5 west. The N. E. ¼ of section No. 19, township No. 59 N., range 5 west. The E. ½ of the N. W. qr. of section 19, in township No. 59 north, and of range 5 west. The E. ½ of the S. E. qr. of , township No. 57 north, and of range 6 west. The N. E. qr. of section 21, in township No. 57 north, and of range 8 west. The N. ½ of the S. W. qr. of section 29, in township No. 57 north, and of range 7 west. The W. ½ of the S. E. qr. of section 29, in township No. 57 north, and of range 7 west. The N. E. qr. of section 29, in township No. 57 north, and of range 7 west. (Sections 22, 23, 24, 13 and 14, in township No. 58 north, and of range 5 west. Section 19, in township 58 north, and of range 4 west.) The lands included in these brackets are those on which Marion city was laid out, and also his interest in the Marion City Ferry; lots 5 and 6, in block No. 26, in the town of Palmyra. Lots 4, 5 and 6, in block No. 27, in the town of Palmyra, known as the plat of Dickerson's addition to the town of Palmyra; and 12 1/10 acres of land, known and described as follows: Beginning a point in the west line of the lands selected as the seat of justice of Marion county, 15 feet north of the southwest corner of the said seat of justice, thence west with the county road 44 poles; thence north 44 poles; thence east 44 poles to the said west line of the seat of justice; thence south 44 poles with the said west line to

the said point of beginning. Together with the buildings and improvements thereunto belonging, and will sell the same (subject to all prior liens and judgments) to the highest bidder for ready money, at the court-house door in the town of Palmyra, in the county and State aforesaid, on Thursday, the 17th day of August next, between the hours of nine and five o'clock of that day, to satisfy said execution and costs.

J. J. MONTGOMERY,
Sheriff of Marion County.

July 26th, 1843.

Indorsed upon said notice is the sheriff's return, as follows, to wit:

*Sheriff's Return.*

State of Missouri, County of Marion, *sct.*

I hereby certify that by virtue of the annexed execution I levied on the property mentioned in the within advertisement, which is to be taken and considered as a part of my return, and did expose the same to sale before the court-house door, in the town of Palmyra, on the 17th day of September, 1843, during the term of the Circuit Court for said county, after having previously advertised the same at least twenty days before the day of sale, by six handbills or advertisements, signed by me, and put up in public places in different parts of the county of Marion aforesaid, and Allen Gallaher became the purchaser thereof, at the sum of six hundred and forty-three dollars, a bill of which sale is herewith returned.

J. J. MONTGOMERY,
Sheriff, M. C.

| | |
|---|---|
| Clerk's cost, . . . . . | $1 00 |
| Levy, . . . . . | 1 00 |
| Commission, . . . . . | 15 86 |
| | $17 86 |

Deducting clerk's and sheriff's costs, to wit, seventeen dollars and eighty-six cents, entitles the annexed execution to a credit of six hundred and twenty-five dollars and fourteen cents.

J. J. MONTGOMERY,
Sheriff, M. C.

Afterwards, to wit, on the 30th day of August, 1843, there was issued from the office of the clerk of the Circuit Court of Marion County, Missouri, a writ of execution, as follows, to wit:

*Execution.*

State of Missouri, County of Marion.

The State of Missouri to the sheriff of Marion County greeting:

Whereas James Gallaher, on the 5th day of May, in the year of our Lord eighteen hundred and forty-one, at our Circuit Court for said county of Marion, recovered against Ezra Stiles Ely, for debt, the sum of two thousand eight hundred and sixty-six dollars and 97 cents, and the sum of three hundred and sixty-five dollars and 58 cents, which to the said James Gallaher were adjudged for his damages, by reason of the detention of said debt, and also the sum of dollars and cents, costs.

These are therefore to command you that of the goods and chattels and real estate of the said Ezra Stiles Ely, you cause to be made the debt, damages and costs aforesaid, and that you have the same before the judge of our said court, on the first Monday in next, to satisfy said debt, damages and costs, and that you have then there this writ, certifying how you have executed the same.

Witness, John P. Rutter, clerk of our said court, and the seal thereof; done at office in Palmyra, at the county aforesaid, on this 30th day of August, A. D. 1843.

[SEAL.]

JOHN P. RUTTER,
Clerk.

Upon which said writ of execution are the following indorsements, to wit:

Received this writ August 30th, 1843.

J. J. MONTGOMERY,
Sheriff, M. C.

(Attached to which execution is the following levy by the sheriff, to wit:)

*Sheriff's Levy and Return.*

A list of property levied upon at the residence of Dr. E. S. Ely, October 13, 1843, by virtue of the annexed execution in my hands in favor of James Gallaher *v.* E. S. Ely, to wit: about 400 volumes of medical, theological and other books; 1 book case, 1 pine wardrobe, 1 walnut dining-table, 7 chairs, a book case with drawers and a variety of medicines, 1 pr. of brass andirons, 3 stoves, shovel and tongs, one mahogany table, 4 small tables, 8 cane-bottom chairs, 3 waiters, one fine mahogany horizontal piano-stool, 1 corner cupboard with thirty odd pieces of blue and white cupboard ware, 1 turkey carpet, 4 ingrain carpets, 1 mantle clock, 2 mahogahy tables, 12 mahogany chairs, 1 crimson plush rocking-chair, 1 pr. brass andirons, 2 parlor looking-glasses, 1 upright piano, 5 mahogany bureaus,

2 dressing glasses, 4 rocking-chairs, 2 wash bowls and pitchers, 1 case of medical instruments, kitchen and household furniture, one large dressing-glass and bureau, one single maple bedstead, 2 short post mahogany bed-posts, 2 mahogany arm-chairs, 1 80-foot measuring tape, 1 case of medical instruments, 2 feather beds, one single and one double and two single mattresses, and three large mattresses with bolsters and pillows, one quilting-frame, one trundle bedstead, 3 trunks, 3 empty boxes, a quantity of tin pipe and spouts, one side saddle, a remnant of store goods, consisting of combs, buttons, brushes, iron spoons, locks, screws, locks, door and window bolts, flat irons, door-ketches without locks, lanterns, glass lamps, &c., a variety of kitchen furniture, a tablet of china, a quantity of glass bottles, 5 large boxes and sundry empty barrels, and one small dearborn *waggin* and harness, 1 four horse wagon and harness, 1 ox-cart, 1 grindstone, 4 large ploughs, 21 window-frames, 1 broken ox-cart, 11 window-frames in corn-crib, 1 gig, two cross-cut saws, 4 stacks of hay, one *shy*, a quantity of sash and stripping stuff in barn-loft: also the following named slaves, to wit, a negro man slave named Matt Casey, and his wife Hannah, and four men named Ambrose Maybe, George Bona Parte, Jessee Henson and Ben Johnson, and one woman named Melinda and her two children named Jane and Martha, and one woman named Elisa and her child named Matilda, also one girl named Jane Bonman, a girl named Adeline aged about four years, a boy named Nicholas, a boy named Jesse 8 or 9 years old, a girl named Bekka about 2 years old.

J. J. MONTGOMERY,
Sheriff, M. C.

Also upon the said execution appears an indorsement in the words and figures following, to wit:

This execution is entitled to a credit of three thousand dollars, which was paid by E. S. Ely, D.D., to James Gallaher, in six shares of stock (of five hundred dollars a share), in the Jefferson Medical College, located in the city of Philadelphia, Pennsylvania, which stock Dr. Ely avers to be now, and to have always been, at par.

JAMES GALLAHER,
By his agent, ALLEN G. GALLAHER.

November 17th, 1843.

And afterwards, to wit, on the 30th day of August, A. D. 1843, was issued from the office of the clerk of the Circuit Court an execution, directed to the Sheriff of Ralls County, as follows, to wit:

*Execution.*

State of Missouri, County of Marion.

The State of Missouri to the Sheriff of Ralls County, greeting:

Whereas James Gallaher, on the 5th day of May, in the year of

our Lord eighteen hundred and forty-one, at our Circuit Court for said county of Marion, recovered against Ezra Styles Ely, for debt, the sum of two thousand eight hundred and sixty-six dollars and ninety-seven cents, and the sum of three hundred and sixty-five dollars and fifty-eight cents, which to the said James Gallaher were adjudged for his damages by reason of the detention of said debt, and also the sum of dollars and cents costs. These are therefore to command you that of the goods and chattels and real estate of the said Ezra Stiles Ely you cause to be made the debt, damages and costs aforesaid, and that you have the same before the judge of our said court on the first Monday in next, to satisfy said debt, damages and costs, and that you have then and there this writ, certifying how you have executed the same.

Witness John P. Rutter, clerk of our said court, and the seal thereof, done at office in Palmyra, at the county
[SEAL.] aforesaid, on this 30th day of August, A. D. 1843.

JOHN P. RUTTER,
Clerk.

Upon which said execution are the following indorsements, to wit:

This execution came to hand this 11th day of September, 1843.

JOHN JAMESON,
Shff. Ralls County.

*Sheriff's Levy and Return.*

I have levied this execution upon the following described real estate, to wit:

| | | | | | | |
|---|---|---|---|---|---|---|
| 80 acres | W. ½ N. W. qr. | Section | 8, | Town. | 56, | Range 6. |
| 80 " | E. ½ S. W. | " | 8, | " | 56, | " 6. |
| 80 " | W. ½ S. W. | " | 23, | " | 56, | " 6. |
| 639 72/100 " | | " | 1, | " | 53, | " 6. |
| 80 " | E. ½ S. E. | " | 4, | " | 56, | " 6. |
| 160 " | S. W. | " | 3, | " | 56, | " 6. |

And attached to said execn. is an advertisement, in the words and figures following, to wit:

*Notice of Sale.*

Sheriff's Sale.

In virtue and by authority of an execution in my hands, in favor of James Gallaher, and against Ezra Stiles Ely, I have levied upon and seized all the right, title, interest and claim of the said Ely in and to the following described real estate, to wit:

| | | | | | | |
|---|---|---|---|---|---|---|
| 80 acres | W. ½ of the N. W. qr. | of Section | 8, | Township | 56, | Range 6. |
| 80 " | E. ½ S. W. | " | 8, | " | 56, | " 6. |
| 80 " | W. ½ S. W. | " | 23, | " | 56, | " 6. |
| 639 72/100 " | Section one, | Township | 53, | Range | 6. | |

80 acres E. ½ of the S. E. qr. Section 4, Township 53, Range 6.
160 " S. W. qr. of Section 3, Township 56, Range 6.
80 " S. W. ¼ S. W. qr. 10, " 56, " 6.
40 " N. W. ¼ N. E. Sec. 9, " 56, " 6.
40 " S. E. S. E. Section 9, " 56, " 6.
80 " W. ½ S. E. " 9, " 56, " 6.
640 " Section 10, Township 56, Range 7.
160 " S. W. qr. of Section 11, Township 56, Range 7.
80 " W. ½ N. W. qr. " 11, " 56, " 7.
160 " S. W. qr. Section 32, " 56, " 7.
320 " W. ½ " 36, " 56, " 7.
325 $^{32}/_{100}$ " S. ½ of Section 7, " 56, " 7.

And will sell the same, subject to all prior liens and judgment, to the highest bidder, for ready money, at the court-house door in the town of New London, on Wednesday, the 11th day of October next, between the hours of nine and five o'clock of that day and during the sitting of the Circuit Court, to satisfy said execution and costs.

JOHN JAMIESON,
Shff. Ralls County.

Sept. 14, 1843.

Bal. due on this execution $2932 81.

*Commn. this Writ.*

State of Missouri, County of Marion, *ss.*

I, Thomas E. Thompson, clerk of the Circuit Court within and for said County of Marion, do certify that the foregoing pages contain a full, true and complete transcript of the record and proceedings had in said Circuit Court in relation to the cause therein mentioned, and also of all the original papers filed in said cause, and originally forming a part of the record thereof, as fully and completely as the same remains of record and on file in my said office.

In testimony whereof I have hereto set my hand and affixed the seal of our Circuit Court. Done at office at Palmyra this the 2d October, 1856.

THOS. E. THOMPSON,
Clerk.

*Index.*

Petition, page 1; confession, page 2; copy of note and indorsement thereon, pages 2 and 3; judgment on petition and confession, page 3; execution No. 1, page 4; when recd. by sheriff, page 6; order to suspend sale and return, 6; execution No. 2, page 6; when recd. by sheriff, 7; sheriff's rect. for costs, 8; sheriff's advertise-

ment of sale, 8; return of sheriff of sale under execution, 9; execution No. 3, page 11; when recd. by sheriff, 12; sheriff's advertisement of sale under execution, 13; sheriff's return of sale under execution No. 3, 17; execution No. 4, page 18; when received by sheriff, 20; levy made by sheriff under execution, 20; credit indorsed on execution by plff., 22; execution No. 5, page 23; when received by sheriff, 25; levy made by sheriff, 25; sheriff's advertisement of sale under execution, 25.

THOS. E. THOMPSON,
Clk. for the Tres. and Sec.

$8 10.

*Exhibit No.* 4.

Deed from Sheriff of Marion County to Gallaher.

State of Missouri, County of Marion, *ss.*

In the Recorder's Office.

This indenture, made and entered into this twelfth day of September, in the year of our Lord 1842, between Jordan J. Montgomery, sheriff of Marion County, in the State of Missouri, of the first part, and James Gallaher, of the county of St. Charles, in the State of Missouri, of the second part, witnesseth, that whereas James Gallaher, plaintiff, on the fifth day of May, A. D. 1842, at the Circuit Court for Marion County, in the State of Missouri, hath recovered against Ezra Stiles Ely, defendant, for debt, the sum of two thousand eight hundred and sixty-six dollars and ninety-seven cents, and the sum of three hundred and sixty-five dollars and fifty-eight cents, which to the plaintiff were adjudged for his damages by reason of the detention of the said debt, and also the sum of four dollars and thirty-eight ¾ cents costs; for which said debt, damages and costs a writ of execution was issued on the 11th day of April, 1842, from the office of the clerk of the Circuit Court of the said county of Marion, signed by John P. Rutter, clerk thereof, and to the sheriff of Marion county directed; commanding him that of the goods and chattels and real estate of the aforesaid Ezra Stiles Ely, he cause to be made the debt, damages and costs aforesaid, and that he have the same before the judge of the said court on the first Monday in May, A. D. 1842, to satisfy said debt, damages and costs, and that he certify to said judge how he executed said writ; and that he have then and there said writs; and by authority of said writs of execution, the said Jordan J. Montgomery, sheriff of Marion county aforesaid, levied upon and seized all the right, title, interest and claims of the said Ely in and to the following described real estate, to wit: The Northeast qr. of Section No. 21 (except 15 acres); the E. ½ of the N. W. qr. of Section 21 (except 30 acres on the south side of said qr.); the W. ½ of the N. W. qr. of Section 21; the E. ½ of the

N. E. qr. of Sec. 20 (except 3 acres on the south end of said last named lot); the W. ½ of the S. W. qr. of Section 21, all in township No. 57, and of Range 6 west; all lying and being in the county of Marion, and State of Missouri; together with the buildings and improvements thereunto belonging, and did expose the same to sale, subject to all prior liens and judgment, publicly by auction, for ready money, at the door of the court-house within and for the said county of Marion, on the 12th day of September, A. D. 1842, between the hours of nine in the forenoon and five in the afternoon of that day, during the term of the Circuit Court of said county of Marion (having previously given twenty days' notice of the time and place, and what real estate was to be sold, and where situate, by at least six handbills, signed by Jordan J. Montgomery, sheriff of said county of Marion, and put up in public places in different, of said county of Marion), and the aforesaid party of the second part, who was the highest bidder, at the sum of three hundred and thirteen dollars and fifty cents, became the purchaser thereof. *I herefore for* and in consideration of the sum of three hundred and thirteen dollars and fifty cents, to the aforesaid Jordan J. Montgomery, sheriff, in hand paid by the aforesaid party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part has bargained and sold, and by these presents does sell and convey unto the said party of the second part, all the right, title, interest and claim which the aforesaid defendant, Ely, had in and to the above described real estate, subject to the aforesaid execution, so far as he, the said Jordan J. Montgomery, sheriff of Marion county, can do. To have and to hold the above granted premises to the said party of the second part, his heirs and assigns, forever, against the claim or claims of him, the said Ely, and all others claiming under him, by title acquired since the liens of the aforesaid judgment; but against the claim or claims of no other person or persons whatsoever.

In testimony whereof I, J. Montgomery, sheriff of Marion county, have hereunto set my hand and seal, on the day and year first above written.

[SEAL.]

J. J. MONTGOMERY,
Sheriff of Marion County.

State of Missouri, County of Marion, *ss.* In the Circuit Court, August Term, A. D. 1843.

Be it remembered, that on this 25th day of August, in the year of our Lord 1843, before the Hon. Priestly McBride, judge of the Circuit Court within and for the county aforesaid, came into open court Jordan J. Montgomery, personally known to the said judge to be not only the person whose name is subscribed to the foregoing instrument of writing, as having executed the same, but

as the sheriff of the county of Marion also; and then and there, in open court, before the said judge, acknowledge the said instrument to be his act and deed, for the purposes therein mentioned; a certificate of which acknowledgment is ordered to be by the clerk of the said court indorsed on the back of this deed.

In testimony of which, I, John P. Rutter, clerk of our said court, have hereunto set my hand and affixed the seal of our [L. S.] said court. Done at office at Palmyra, in the county aforesaid.

JOHN P. RUTTER,
Clerk.

Filed for record Feb. 17th, 1845.

JOHN P. RUTTER,
Recorder.

State of Missouri, County of Marion, ss.

I, Thomas E. Thompson, clerk of the Circuit Court and ex officio recorder in and for said county of Marion, certify that the foregoing is a true and full copy of an instrument of writing found of record in my said office, in Book K., for recording conveyances, at pages 386 and 7.

Witness my hand and official seal. Done at office in Palmyra, in the county aforesaid, this 30th day of April, 1851.

THOMAS E. THOMPSON,
Clk. Cir. Ct. and ex-officio Recorder.
By his Deputy, BENJ. F. HAYDEN.

*Exhibit No.* 5.

Rect. Jeff. Med. Coll. Stock by

Received at Balls County, Missouri, November 1st, 1843, of Ezra Stiles Ely, D.D., a certificate of six shares in the Jefferson Medical College stock, in the city of Philadelphia, amounting to three thousand dollars; which sum is to be credited on the execution in Marion County, in the case of James Gallaher *v.* Ezra Stiles Ely; and in consideration whereof I hereby agree, that if said Ely or his heirs will well and truly pay to me the amount, including principal, interest, and costs, of my judgment against him, obtained in foreclosing a mortgage on a farm known as the Moses Gentry Farm, in Marion County, within the term of three years from the date hereof, so that I shall suffer no loss, then and in that case I will reconvey to said Ely the six shares of Jefferson Medical stock above named; and will convey or cause to be conveyed to him or his heirs, or to any one whom he shall name, all my right and title in law to said Gentry Farm, described in the mortgage above referred to, and duly recorded in the

office for recording deeds in Marion County. In witness whereof, I have hereunto set my hand and seal, this 1st day of November, 1843, at Ralls County, Missouri.

JAMES GALLAHER. [SEAL.]

Witnesses: JANE GALLAHER,
MARY G. GALLAHER.

*Exhibit No.* 6.

Deed Gallaher to Patterson.

This deed, made this 31st day of October, in the year 1846, witnesseth that, whereas a judgment was rendered on the 5th day of May, 1841, in the Circuit Court of Marion County, Missouri, in favor of James Gallaher and against Ezra Stiles Ely, for the sum of three thousand two hundred and thirty-two dollars and sixty-two cents, and whereas the said judgment has been fully paid and satisfied by the transfer to said Gallaher of six shares in the Jefferson Medical College, of Philadelphia, and the payment in money of nine hundred and fifty-five dollars and ninety-one cents; now, in consideration of the premises, we, James Gallaher and Lucinda his wife, do hereby convey, sell, release, and quitclaim, unto James H. Patterson, a farm in Marion County, now in the possession of Dr. Furguson, known as the Gentry Farm; being the same farm conveyed to said Gallaher by the sheriff under the execution issued on the above-mentioned judgment. This conveyaace is made in conformity with an agreement made with Dr. Ezra Stiles Ely, of November 1st, 1843; the written order of Dr. Ely, of March 30th, 1846, in favor of the said Patterson, being this day presented to me by said Patterson, to have and to hold to the said Patterson and his heirs forever. For testimony whereof we have hereunto set our hands and seals, this thirty-first day of October, in the year 1846.

JAMES GALLAHER, [SEAL.]
LUCINDA GALLAHER. [SEAL.]

State of Missouri, County of St. Charles.

Be it remembered, that on this 31st day of October, eighteen hundred and forty-six, before the undersigned, clerk of the Circuit Court within and for St. Charles County, personally appeared James Gallaher and Lucinda his wife, who are both personally known to me to be the persons whose names are subscribed to the foregoing instrument of writing as party thereto, and they severally acknowledged the same to be their act and deed. The said Lucinda Gallaher, being by me first made acquainted with the contents of said instrument of writing, acknowledged, on an examination apart from her husband, that she executed the same, and relinquishes her

dower to the real estate therein mentioned, freely, and without compulsion or undue influence of her husband.

In witness whereof, I hereunto set my hand and affix the seal
[ ] of said court, at office, the day and year arforesaid.

LUDWELL E. POWELL,
Clerk.

By BENJ. EMMONS, JR.,
Deputy Clerk.

State of Missouri, County of Marion, *ss.* In the Recorder's Office.

I, John P. Rutter, recorder within and for said county of Marion, certify that the foregoing instrument of writing, together with the certificate thereon, was received by me for record Nov. 14th, 1846, and that the same has been duly recorded in my said office, in Book M., for recording conveyances, &c., at pages 258 and 259.

Given under my hand and official seal. Done at office at
[ ] Palmyra, in the county and State aforesaid, this 13th day of April, 1847.

JOHN P. RUTTER,
Recorder.

By his Deputy, BENJ. F. HAYDEN.

*Exhibit No.* 7.

Deed Patterson to Tatlow.

This indenture, made and concluded the fifth day of November, A.D. 1846, between James H. Patterson and Mary Ann his wife, of Marion County, in the State of Missouri, of the one part, and Thomas H. Tatlow, of the county and State aforesaid, of the other part, witnesseth, that the said James H. Patterson has, for and in consideration of the sum of two hundred dollars in hand paid, on or before the sealing or delivery of these presents, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth bargain and sell, all that tract of land in Marion County which Dr. Ely purchased from Rhodes Gentry, and described as follows: The northeast qr. section 21, except 15 acres; east half northwest qr. section 21, except 30 acres; west half northwest qr. section 21; east half northeast qr. section 20, except 3 acres, and the west half southwest qr. sec. 21, township 57, page 6 west, unto the said F. H. Tatlow, his heirs and assigns, together with all and singular the improvements thereunto belonging; to have and to hold unto the said F. H. Tatlow, his heirs and assigns, forever. To have and to hold the title which the said Patterson obtained from Jane Gallaher.

In witness whereof, the said James H. Patterson and Mary Ann, his wife, have hereunto set their hands and seals, the day and year

above written. It is understood by the parties that the said Patterson conveys all of his right, title, and interest in the above-described property that he received from James Gallaher, in a deed from the said Gallaher, dated the 31st October, 1846, and that title alone.

JAMES H. PATTERSON. [L. S.]
M. A. PATTERSON. [L. S.]

State of Missouri, County of Marion, *ss.*

Be it remembered, that on this sixth day of November, 1846, before me, Oliver Brown, a justice of the peace, in and for Marion County, personally came James H. Patterson and Mary Ann, his wife, both personally known to me to be the persons whose names are subscribed to the foregoing instrument of writing, and having executed the same, and severally acknowledged the same to be their act and deed for the purposes therein mentioned, she, the said Mary Ann Patterson, being first made acquainted by me with the contents thereof, and examined separate and apart from her husband, whether she executed the said deed and relinquished her dower in the lands and tenements therein mentioned, voluntarily, freely, and without compulsion, or undue influence of her said husband, acknowledged and declared that she executed the said deed, and relinquished her dower in said lands and tenements therein mentioned, voluntarily, freely, and without compulsion of her said husband.

Given under my hand this said sixth day of November, 1846.

OLIVER BRISON,
J. P.

State of Missouri, County of Marion, *ss.*

In the Recorder's Office.

I, John P. Rutter, recorder within and for said county, certify that the within deed, together with the certificate thereon, was received by me for record November 14th, 1846, and that the same has been duly recorded in my said office in book M., for recording conveyances, at pages 259 and 260. Given under my hand and official seal, done at office at Palmyra, in the county and State aforesaid, this 13th day of April, 1847.

JOHN P. RUTTER,
Recorder.
By his deputy, BENJ. F. HAYDEN.

*Exhibit No.* 8.

Deed—Tatlow to Caldwell.

Know all men by these presents, that the undersigned, Thomas H. Tatlow and Eliza J. Tatlow, his wife, have this day, in con-

sideration of the sum of seventeen hundred and fifty dollars to them in hand paid, have this day granted, bargained, and sold, and we do by these presents grant, bargain, and sell to William D. Caldwell, of the county of Marion and State of Missouri, the following lands and tenements lying in said county, and described as follows, to wit: the southeast quarter and the east half of the southwest quarter of section sixteen, township fifty-seven, range six west (except forty acres taken off of the northeast corner of said southeast quarter, 113 rods in length east and west, and 56 rods, 23 poles in width north and south). And also eighty acres, part of the north half of section twenty-one, bounded as follows: beginning at the northeast corner of said section twenty-one, and running thence two hundred and forty poles west, thence fifty-three and ⅓ poles south, thence two hundred and forty poles east, thence fifty-three and one-third poles north, to the place of beginning, in township 57, range 6 west. Said lands and the appurtenances thereto belonging, to have and to hold to the said William D. Caldwell and his heirs and assigns forever.

In testimony whereof, we have hereunto set our hands and seals, this the 22d day of September, A.D. 1849.

T. H. TATLOW. [SEAL.]
ELIZA JANE TATLOW. [SEAL.]

State of Missouri, County of Marion, *ss.*

Be it remembered, that Thomas H. Tatlow and Eliza J. Tatlow, wife of said Thomas H. Tatlow, both of whom are personally known to the undersigned, justice of the peace within and for said county, to be the persons whose names are subscribed to the foregoing deed, as having executed the same, this day appeared before me in said county of Marion, and the said Thomas H. Tatlow then and there acknowledged that he executed said deed for the purposes therein mentioned; and the said Eliza J. Tatlow having been by me duly acquainted with the contents of said deed, and on an examination separate and apart from her said husband, acknowledged that she executed said deed, and relinquished her dower in the lands therein mentioned, freely, voluntarily, and without any compulsion or undue influence on the part of her said husband.

In testimony whereof, I have hereunto set my hand and [SEAL.] seal, this the 22d day of September, 1849.

W. H. CLAGGITT,
Justice of the Peace.

State of Missouri, County of Marion, *ss.*

In the Recorder's Office.

The foregoing instrument of writing, with the certificate theron, was filed for record in my said office on the 29th of September, 1849, and is duly recorded in deed book P., at page 267.

Given under my hand and official seal, done at office at
[L. S.] Palmyra, State and county aforesaid, this the 3d of October, 1849.

THO. E. THOMPSON,
Recorder.

*Exhibit No.* 9.

Deed—Ely to Tatlow.

This deed, made and entered into this 1st day of January, A.D. 1850, between Ezra Stiles Ely, D. D., of the city of Philadelphia, in the State of Pennsylvania, of the first part, and Thomas H. Tatlow, of the county of Marion and the State of Missouri, of the second part, witnesseth, that the said Ezra Stiles Ely, for and in consideration of the sum of two hundred dollars, paid by the said Thomas H., the receipt of which is hereby acknowledged, by these presents, doth bargain, sell, release, quitclaim, and convey unto the said Thomas H. Tatlow, and to his heirs and assigns, forever, the following described parcel of land lying in said County of Marion, that is to say, the northeast quarter of section 21, except 15 acres thereof; the east half of the northwest quarter of section 21, except thirty acres thereof; the west half of the northwest quarter of section No. 21; the east half of the northeast quarter of section 20, except three acres, and the west half of the southwest quarter of section No. 21, all in township No. 57 north, of range No. 6 west, together with the appurtenances, being the same land heretofore sold and conveyed by one Rhodes Gentry to the said Ely, to have and to hold the said lands, together with all the rights, privileges, and appurtenances thereto belonging, unto the said Thomas H. Tatlow, his heirs and assigns, forever.

In testimony whereof, the said Ezra Stiles Ely has here-
[SEAL.] unto set his hand and seal, the day and year aforesaid.

EZRA STILES ELY.

State of Pennsylvania, City and County of Philadelphia, *ss.*

Be it remembered, that on the 15th day of January, A.D. 1850, before me, Anthony W. Olivine, prothonotary or clerk of the Court of Common Pleas, for the city and county aforesaid, personally came the Reverend Ezra Stiles Ely, D.D., known to me to be the person whose name is subscribed to the foregoing deed of quitclaim, as having executed the same, and acknowledged the foregoing to be his hand and seal, act and deed, for the purposes therein set forth.

In witness whereof, I have hereunto set my hand and name as clerk of the said court, and the public seal of the
[SEAL.] same, which is a court of record, on the day and date last above written.

ANTHONY W. OLIVINE.
Prothonotary.

Filed for record on the 30th January, 1850.

THOMAS E. THOMPSON,
Recorder.

State of Missouri, County of Marion, *ss.*

In the Recorder's Office.

I, Thomas E. Thompson, recorder within and for the county aforesaid, certify that the foregoing is a full, true, and complete copy of an instrument of writing, together with the certificate of acknowledgment and date of filing thereon, as fully and completely as the same appears of record in said office, in deed book P., at page 473.

In testimony whereof, I have hereunto set my hand and [L. S.] affixed the seal of said court. Done at office at Palmyra, this 8th day of July, 1856.

THOMAS E. THOMPSON,
Recorder.
By N. W. THOMPSON,
Deputy.

*Exhibit No.* 10.

Deed of trust, made and executed by Ezra Stiles Ely, D.D., to Margaret Carswell, widow, and Samuel McClellan, M.D., Nov. 22d, A.D. 1837.

Whereas, the Government of the United States of America, by their unwise hostility to the late and present Bank of the United States, located in the city of Philadelphia, and by other ruinous measures have so disturbed the ordinary course of business, destroyed confidence, cramped enterprise, and dispelled from circulation the ordinary currency of the country, that said government cannot pay its own debts, but has retracted some of its engagements, and resorted to the expedient of issuing treasury notes payable a year after date; whereas the banks throughout our country have, for an indefinite time, suspended the payment of their own notes except by other notes of banks, individuals, or the treasury of the United States, and have in many instances emitted post notes, payable twelve months after date; whereas, nearly half of the most prudent, respectable, and extensive merchants in the great cities of New York and Philadelphia, have either become bankrupt or have been compelled to obtain an extension of the time appointed for the discharge of their debts; and whereas the subscriber is, in these distressing times, indebted to several individuals, some of whom might, by sacrificing his property to pay themselves, prevent him ultimately from doing justice to all his creditors:

Now, therefore, know all men by these presents, that in consideration of the premises, as also of ten dollars, to me in hand paid at the time of ensealing this instrument of writing, I, Ezra Stiles Ely,

D.D., of Marion County, in the State of Missouri, have bargained, sold, transferred, and assigned to Margaret Carswell, widow, of the aforesaid Marion County, and to Samuel McClellan, M.D., of the city of Philadelphia, in the State of Pennsylvania, the following described real and personal property, to be by them as tenants in common, and not joint tenants, held, possessed, and disposed of, in trust, in the manner and for the purposes hereinafter prescribed and ordained, to wit:

The northwest quarter of the northeast quarter of section No. 25, in township No. 57 north, in range No. 8 west of the principal meridian, sold by the United States, agreeably to certificate No. 8703, and conveyed by Jacob Earnest to Ely for $75. The southwest quarter of section seven, in township fifty-eight, of range seven west, in the district of lands subject to sale at Palmyra, Missouri, containing 162 acres, patented to John Roche by certificate No. 3713, and by said Roche conveyed to E. S. Ely (cost $1440). The southeast quarter of the southeast quarter of section No. twenty-six; the west half of the southeast quarter of section No. 26; the east half of the northeast quarter of section No. twenty-seven; the west half of the southwest quarter of section No. twenty-six; and the west half of the northwest quarter of section No. thirty-six, township No. fifty-seven north, in range No. 7 west, in the district of lands sold at Palmyra by the United States, containing three hundred and sixty acres, conveyed by John Moss, junior, to E. S. Ely, for the sum of $1500 dollars.

The east half of the southwest quarter of section No. thirty-three, in township No. fifty-eight north, of range No. 5 west, in the district of lands sold by the United States at Palmyra, Missouri, which S. W. B. Carnegy conveyed to E. S. Ely for $275.

One hundred and forty-two lots in Marion City, in Marion County, conveyed to E. S. Ely by deed of John McKee and wife, recorded in deed-book D., pages 397 and 398, in the proper office at Palmyra.

Fifty-six lots in Marion City aforesaid, conveyed to E. S. Ely by Urial Wright and wife by deed, recorded in the proper office at Palmyra, in deed-book E., page 1.

Ten lots in Marion City aforesaid, bought of John M. Hood and conveyed to E. S. Ely by Wm. Muldrow, by deed, recorded in deed-book E., pages 136, &c., in the proper office at Palmyra.

All the right and title of Ezra Stiles Ely to an equal undivided eighth part in all the unsold and undivided lots in Marion City, and in all the buildings thereon erected.

The east half of the northeast quarter of section No. seventeen, in township No. 58, north of the base line, in range No. five west of the 5th principal meridian containing 80 acres.

The fractional section, No. twenty-two, in township *in township* No. 59, north of the base line in range No. 5, west of the 5th principal meridian.

The southeast fractional quarter of section No. 28, in township No. fifty-nine, north of the base line in range No. 5 west, of the 5th principal meridian, together with the frame dwelling-house and the framed storehouse thereon erected.

The west half of section No. twenty-eight, in township No. fifty-nine, north of the base line, in range No. 5, west of the 5th principal meridian, containing 320 acres.

The east half of the northwest quarter of section No. ten, in township No. fifty-six, north of the base line, in range No. six west of the principal meridian, except ten acres of the same sold to Girard.

The northwest quarter of the northeast quarter of section No. ten, in township No. fifty-six, north of the base line, in range No. six west.

The southwest quarter of section No. 3, in township No. fifty-six north, in range No. six, west of the 5th principal meridian.

The east half of the southeast quarter of section No. four, in township No. fifty-six north, in range No. six west.

The west half of the southeast quarter of section No. four, in township No. fifty-six north, in range No. 6 west, which James P. McElroy sold to E. S. Ely for $320, in 1835.

The northwest quarter of section No. three, and the northeast quarter of section No. four, and the east half of the northwest quarter of section No. four, in township No. fifty-six north, in range No. 6 west, which Bird and others conveyed to E. S. Ely for $2800.

The east half of the southwest quarter, and the east half of the southeast quarter, and the southwest quarter of the southeast quarter of section No. thirty-three, in township No. fifty-seven, north of the base line, in range No. six west, which 200 acres with the house thereon, cost E. S. Ely $1600.

The north half of section No. thirty-three, in township No. fifty-seven north, in range No. six west, and the west half of the northwest quarter of section No. thirty-four, in the same township and range, which, with the houses thereon erected, and the improvements made, cost E. S. E. $4370; seventeen acres and a half of this tract sold to Eaton & Baldwin for $700, being excepted from this conveyance.

All those 447 acres of land, except 5, sold by the subscriber to J. C. Beatty, 5 to Alexander J. Dallas, and 5 to Benjamin Pyatt, situate in sections 20 and 21, in township No. fifty-seven north, in range 6 west, which Rhodes Gentry, by deed, recorded in deed-book C., pages 417 and 418, conveyed to the subscriber, together with the old log houses, the new frame house, and the barns thereon erected, with all the appurtenances of the same, subject only to a mortgage for $2886 dollars, lately executed to the Rev. James Gallaher to secure the payment of that sum, together with 8 per cent.

interest. Sixty acres of land, more or less, remaining unsold, in the tract which James Thomas, by deed, recorded in deed-book C., page 405, in the recorder's office at Palmyra, sold to the subscriber on the 19th of August, 1835, together with two new framed two-story houses thereon erected, which lot and houses cost $2400. The northeast quarter of the northeast quarter of section No. 29, in township No. fifty-seven north, in range No. 6 west, containing 40 acres, which Charles Moffett and Robert Moffet conveyed to the subscriber, August 28th, 1835, agreeably to deed recorded in the proper office, in deed-book C., pages 412 and 413. The west half of the southwest quarter of section No. 16, in township No. 57 north, in range No. six west, which Elisha Baldwin, Faithy Baldwin and James Thomas conveyed to the subscriber, August 19th, 1835, for $360, agreeably to deed recorded at Palmyra, in deed-book C., pages 402 and 403. All that certain lot of ground, together with two log and two frame houses thereon erected, situate and known as the west half of the southeast quarter of section No. 23, in township No. 56 north, in range No. 6, west of the 5th principal meridian. All the right, title, and interest of the subscriber in and to an equal undivided half of that steam saw and grist-mill, situate in Ralls county, and known as the "Ely McKee Mill," and to a lot of 80 acres of ground whereon said mill, together with several other buildings, are situated, known as the northeast quarter of the northwest quarter, and the northwest quarter of the northeast quarter of section No. 26, in township No. 56, north of the base line, in range No. 6, west of the 5th principal meridian, which lots of 40 acres each were conveyed to E. S. Ely and John McKee, as tenants in common, by Norton & Hall and others.

An equal, undivided fifth part in that tract of land in Ralls County, containing sundry remarkable salt sulphur springs, together with sundry buildings thereon erected, known as the east half of the southeast quarter of section No. 26; the east half of the northeast quarter of section No. 35; the west half of the northwest quarter of section No. 36; and the west half of the southwest quarter of section No. 25, in township No. 56 north, in range No. 6 west, which tracts of land contain 320 acres, one-fifth part of which was conveyed to the subscriber by Moses D. Bates and wife, as will appear by deed recorded in the office at New London, in Deed Book B., pages 405 and 406. All that certain lot of ground containing ten acres, lying in a piece 20 rods wide from east to west, and 80 rods deep from north to south, which is situate on the west side of the northeast quarter of the southeast quarter of section No. 34, in township No. 57, north of the base line in range No. 6, west of the 5th principal meridian; which lot of land John McKee and wife, and Samuel Muldrow, conveyed to the subscriber by deed duly recorded at Palmyra. The northwest quarter of section No. 31, in township No. 56 north, in range No. 7 west, which Josuah Gentry

shall sell each and every unsold portion of the real and personal estate hereby conveyed to them in trust, at public auction to the highest and best bidder, and shall pay over the net proceeds of said sale to his creditors to discharge every debt in full; or if the proceeds of sale shall not be sufficient for this, then to pay each and every person to whom the said Ely is now indebted rateably, according to the sum of money due to each creditor, and the proceeds of sale to be divided among all the creditors. It is moreover provided that if the said Ely shall, on or before the said first day of January, A. D. 1842, pay or have paid each and every creditor to whom he is indebted by any obligation, note of hand, indorsement, or other contract formed prior to the ensealing of this instrument, the full amount due to said creditor or creditors, then this deed of trust shall thenceforward become and forever remain null and void, as though it had never been signed and sealed; otherwise it shall be and remain in full force, according to the terms and conditions hereinbefore provided, made, and expressed. Finally, any creditor who may attempt to collect any debt from the subscriber by process of law against him, is hereby expressly excluded from all interest in and benefit from this deed of trust.

In witness whereof I have hereunto set my hand and seal on the twenty-second day of November, A. D. 1837.

E. S. ELY. [SEAL.]

State of Missouri, County of Ralls, *ss.*

Be it remembered, that on the twenty-second day of November, A.D. 1837, before me, William Forman, Esq., one of the justices of the County Court, in and for the county of Ralls, personally came the Rev. Ezra Stiles Ely, D.D., known to me to be the person whose name is subscribed to the foregoing instrument of writing, as having executed the same, and acknowledged the same to be his act and deed, hand and seal, for the purposes therein mentioned, taken and certified on the day and date above written.

Witness my hand and seal.

WILLIAM FORMAN, [SEAL.]
J. C. C.

State of Missouri, County of Marion, *ss.*

In the Recorder's office.

I, Stanton Buckness, recorder within and for said county of Marion, do hereby certify, that the foregoing instrument of writing, together with the certificate thereon, was received by me for record on the 5th day of December, A.D. 1837, and that they are duly recorded in my said office, in book E., for recording conveyances, &c., at pages 376, 78, 9, 380, 1, and 2.

Given under my hand and official seal; done at office, in
[SEAL.] Palmyra, at the county aforesaid, on this 1st day of January, A.D. 1838.

STANTON BUCKNER,
Recorder.

*Exhibit No.* 11.

State of Missouri, County of Marion, *ss.*

In the Recorder's office.

Mortgage Deed. Mortgage—Ely to Carswell and McClellan.

This indenture witnesseth, that the subscriber, Ezra Stiles Ely, D.D., late of the city of Philadelphia, and now of West Ely, in Missouri, has executed sundry deeds of assignment, the original of which bear the date of the 22d of November and the 7th of December, 1837; that these deeds have been filed for record in the proper office in the counties of Marion and Ralls; that the subscriber has been advised by counsel learned in the law, that these deeds of assignment of property in trust are null and void in law; that the subscriber is indebted to his ward, Mary Ann Ely Carswell, in the sum of thirty thousand dollars, together with interest on the same for several years past, which debt will be very considerably increased before the said ward can arrive at the period of her majority; that the subscriber is indebted to his wards, the children of Clement Lee Brady, lately of Philadelphia, deceased, in a sum not less than four thousand dollars; that the subscriber regards these debts as being of a peculiar character, and of permanent claim; that the subscriber has received of Mrs. Margaret Carswell, widow, of Marion county, of the State of Missouri, the grandmother and guardian of the person of the aforesaid Mary Ann Ely Carswell, and of Samuel McClellan, M. D., of the city of Philadelphia, in the State of Pennsylvania, the sum of ten dollars, to his full satisfaction, and that in consideration of the premises, the subscriber doth hereby bargain, sell and convey to the said Margaret Carswell and to the said Samuel McClellan, and to that individual of the two who shall survive the other, and to the executor or executors, and administrator or administrators of such survivor, in trust for the full payment of the aforesaid debts, each and every portion of the estate and property hereinafter described, whether the estate be real, personal, or mixed, to wit: the unexpired time of service of a colored man, named Ambrose, who is to be discharged from servitude when he shall have refunded by his labor, estimated at a fair price, the money he has cost, and may yet cost, the subscriber; the unexpired time of service of a colored servant, named Jesse, who is to be free when he shall have completed the 21st year of his age; the unexpired time of the service of a colored woman, named Melinda; the unexpired time of

the service of a colored servant woman, named Eliza; a debt due to the subscriber, in book account from the president and trustees of Marion college, in Missouri, believed in equity to amount at least to fifteen thousand dollars, whether the same prove to be more or less; five mares, one iron-gray horse, one black horse, bought for Ambrose; one horse colt, a quantity of brick, now on the college farm, supposed to amount to 30,000, be the same more or less; all the hay, corn, and oats belonging to the subscriber, ten yoke of oxen or steers, three bulls and cows, three calves and young steer, and two yearling heifers, on the farm on which the subscriber now lives; a flock of about 20 sheep, with about 50 swine, and a herd of young cattle now on the farm and under the care of Benjamin Ashburned; a herd of swine, which Michael Monk has contracted to deliver to the subscriber; all the rent due on until the expiration of this mortgage, to become due from any of the houses and lands of the subscriber situate in the State of Missouri, with all the increase and issues of his mares, cattle and swine, and cultivated fields; one surveyor's compass, one chaise, one dearborn wagon, one two-horse wagon, with elliptical springs, one ox-wagon, one ox-cart, sundry ox-yokes and chains, seven plows, one harrow, with iron teeth, one cultivator, one patent revolving rake, sundry hoes, pickaxes, axes, saws, spades, shovels, hand-rakes, and 12 scythes, with their schnathes, two sets of double horse harness, two harnesses for a single horse, a library of theological, medical, scientific, and other books, worth six thousand dollars; four silver tumblers, one silver castor, one silver cake basket, one silver coffeepot, two silver teapots, one silver slop bowl, one silver sugar bowl, one silver cream vessel, one silver soup ladle, one silver sugar tongs, two silver sauce ladles, two silver butter knives, a variety of large and small silver spoons, sundry silver forks, one iron fire-proof chest, three mahogany bedsteads, three bureaus, two mahogany and two walnut tables, one large looking-glass, two dressing-glasses, ten cane-bottomed chairs, sundry Windsor chairs, four carpets, three iron stoves, one fine wardrobe, one book-case and desk, four pairs of hand-irons, with as many shovels and tongs, a variety of knives and forks, tubs, kettles, crockery, and other household and kitchen furniture; a debt of three thousand dollars, due from William Muldrow; a debt of $500, due from Samuel Donahower; a debt of $500, due from Joseph M. Hamton; a debt of $500, due from Samuel Carswell Ely; a debt of $1000, due from the late firm of Ely, Watson & Hendricks; a debt, due from Paul Hunter; a debt of $500, due from Robert J. Smith; a debt of $500, due from William R. Downing; a debt from Crigmire, Crumly & Meley, of about one thousand dollars. All that tract of land known as the northwest quarter of the northeast quarter, section No. 25, in township No. 57, north of the base line, in range No. 8, west of the fifth principal meridian in the district of lands offered for sale at Palmyra, in Missouri; the south-

west quarter of section No. 7, in township No. 58 north, in range No. 7 west as above; the southeast quarter of the southeast quarter of section No. 26; the west half of the southeast quarter of section No. 26; the east half of the northeast quarter of section No. 27; the west half of the southwest quarter of section No. 26; and the west half of the northwest quarter of section No. 36, all in township No. 57 north, in range No. 7 west, which John Moss, jr., conveyed to the subscriber; the east half of the southwest quarter of section No. 33, in township No. 58 north, in range 5 west of the fifth principal meridian; the east half of the northeast quarter of section No. 17, in township No. 58 north, in range No. 5 west; the fractional section No. 22, in township No. 59 north, in range No. 5 west as above; the southeast fractional quarter of section No. 28, in township No. 59 north, in range No. 5 west, together with the two frame houses thereon erected; the west half of section No. 28, in township No. 59 north, in range No. 5 west; the southwest quarter of section No. 3, in township No. 56 north, in range No. 6 west; the east half of the southeast quarter of section No. 4, in township No. 56 north, in range No. 6 west; the west half of the southeast quarter of section No. 4, in township No. 56 north, in range 6 west; the northwest quarter of section No. 3, and the northeast quarter of section No. 4, and the east half of the northwest quarter of section No. 4, in township No. 56 north, in range No. 6 west; the east half of the southwest quarter, and the east half of the southeast quarter; and the southwest quarter of the southeast quarter of section No 33, in township No. 57 north, in range No. 6 west; the north half of section No. 33, in township No. 57 north, in range No. 6 west; the west half of the northwest quarter of section No. 34, in township No. 57 north, in range No. 6 west, together with the buildings thereon erected *erected*, seventeen acres and a half.

This tract, sold to James G. Eaton and Sarah Baldwin, being exempted from this grant, all those four hundred and forty-seven acres of land, except 5 acres sold to J. C. Beaty, 5 acres to Alexander J. Dallas, and 5 acres to Benjamin Pyatt, situate in sections No. 20 and No. 21, in township No. 57 north, in range No. 6 west, which Rhodes Gentry and wife conveyed to the subscriber, together with all the buildings thereon erected, subject only to a mortgage debt of 2886 dollars, with interest, payable to the Reverend James Gallaher, his heirs and assigns; sixty acres, more or less, remaining unsold in a tract of land in Marion county, which James Thomas conveyed to the subscriber by deed, recorded in deed book C., at page 405, in the proper office at Palmyra, together with the two new frame houses and blacksmith shops erected thereon, the northeast quarter of the northeast quarter of section 29, in township No. 57 north, in range No. 6 west; that certain lot or tract of land containing ten acres, lying in a piece twenty rods wide from east to west, and eighty rods deep from north to south, on the west side of the northeast

quarter of the southeast quarter of section No. 34, in township No. 57 north, in range No. 6 west, which John McKee and wife, and Samuel Muldrow, conveyed to the subscriber, bounded on the north side by land belonging to Marion College; on the west side by land of Margaret Carswell, and on the east and west side by land lately belonging to the said John McKee and Samuel Muldrow; all that certain tract of land in Marion county, containing twelve acres and one-tenth of an acre, together with two brick houses and their appurtenances erected thereon, which Daniel Bradley and Hannah his wife conveyed to the subscriber, agreeably to a deed recorded in deed book C., at pages 327 and 328, in the proper office at Palmyra, two certain lots of land, lying in the town of Palmyra, together with the houses thereon erected, known as lot No. 5 and 6, in block No. 26, in the plot of said town, which John C. Pickett and wife conveyed to the subscriber; and also three certain lots of land, situated in Palmyra, aforesaid, together with all the buildings thereon erected, known as lots No. 4, 5, and 6, in block No. 47, in the plat of Dickerson addition to the town of Palmyra, which lots John G. Fergueson and wife conveyed to the subscriber. This indenture witnesseth moreover, that each and every portion of the aforementioned property is granted, sold, bargained, and conveyed to the before named mortgage and mortgages, the said Margaret Carswell and Samuel McClellan in trust as aforesaid, subject to the following condition, that if within five years from the date of this instrument of writing, the subscriber, Ezra Stiles Ely, or his heirs, executor or executors, administrator or administrators, or any or either of them, shall well and truly pay each and every portion of the above named debts due and to become due to the aforesaid ward, Mary Ann Ely Carswell, and the heirs of Clement Lee Brady, deceased, or to their lawful representatives of such of said wards as may at that time be minors still, then and in that case this indenture of mortgage shall become and forever thereafter remain null and void, otherwise it shall be and remain in full force forever. In witness whereof, I have hereunto set my hand and seal, at West Ely, in the county of Marion, in the State of Missouri, on the fifth day of January, in the year of our Lord one thousand eight hundred and thirty-eight.

E. S. ELY. [SEAL.]

Signed, sealed and delivered, in the presence of us, the subscribing witnesses.

GEORGE SHROTER,
MATTHEW HASTINGS,
JOHN R. McMULLIN.

State of Missouri, County of Marion, *ss.*

Be it remembered, that on this sixth day of January, A.D. 1838, before me, Allen G. Gallaher, one of the justices of the peace in and

for the county and State aforesaid, personally came the within named Ezra Stiles Ely, D.D., known to me to be the person whose name is subscribed to the foregoing deed of mortgage, and acknowledged the same to be his act and deed, hand and seal, for the purposes therein named, taken and certified, on the day and date last above written.

ALLEN G. GALLAHER, [SEAL.]
Justice of the Peace.

Filed for record, on the 8th day of January, 1856.

STANTON BUCKNER,
Recorder.

State of Missouri, County of Marion, *ss.*

I, Thomas E. Thompson, clerk of the Circuit Court and ex-officio recorder within and for the county aforesaid, certify that the foregoing is a correct and true copy of said instrument of writing, found of record in my said office, in deed book E., at pages 457, 458, 459, and 460. In testimony whereof, I have hereunto set my hand and affixed my official seal. Doné at office at Palmyra, in the county aforesaid, this the 9th day of July, 1850.

THO. E. THOMPSON,
Cl'k. Ct. Ct. and Ex. off. Recorder.

*Exhibit No.* 12.

MARGARET CARSWELL and SAMUEL MCCLELLAN
*v.*
EZRA STILES ELY.

State of Missouri, County of Marion, *ss.*

In the Circuit Court.

Be it remembered, that heretofore, to wit, on the 23d day of August, A.D. 1843, there was filed in the office of the clerk of said Circuit Court a petition to foreclose a mortgage in the words and figures following, to wit:

*Petition to Foreclose Mortgage.*

State of Missouri, County of Marion.

Marion Circuit Court, August Term, 1843.

To the Marion Circuit Court.

Your petitioners, Margaret Carswell, widow, and Samuel McClellan, M.D., state that on the 5th day of January, A.D. 1838, Ezra S. Ely, D.D., by the name of E. S. Ely, made and executed his

mortgage deed to your petitioners, to secure them in the payment of thirty-four thousand dollars, which he then justly owed Mary Ann Ely Carswell and the children of Clement Lee Brady, and your petitioners at the county of Marion aforesaid, and then and there delivered the said deed to your petitioners in the words and figures following, to wit:

*Mortgage Deed.*

Copy of Mortgage Deed.

This indenture witnesseth that the subscriber, Ezra Stiles Ely, D.D., late of the city of Philadelphia, and now of West Ely, in Missouri, has executed sundry deeds of assignment, the original of which bear the date of the 22d of November, and the 7th of December, 1837; that these deeds have been filed for record in the proper offices in the counties of Marion and Ralls; that the subscriber has been advised by counsel learned in the law that these deeds of assignment of property in trust were null and void in law; that subscriber is indebted to his ward, Mary Ann Ely Carswell, in the sum of thirty thousand dollars, together with interest on the same for several years past, which debt will be very considerably increased before the said ward can arrive at the period of her majority; that the subscriber is indebted to his wards, the children of Clement Lee Brady, lately of Philadelphia, deceased, in a sum not less than four thousand dollars; that the subscriber regards these debts as being of a peculiar character and of a pre-eminent claim; that the subscriber has received of Mrs. Margaret Carswell, widow, of Marion county, of the State of Missouri, the grandmother and guardian of the person of the aforesaid Mary Ann Ely Carswell, and of Samuel McClelland, M.D., of the city of Philadelphia, in the State of Pennsylvania, the sum of ten dollars, to his full satisfaction, and that in consideration of the premises the subscriber doth hereby grant, bargain, sell and convey to the said Margaret Carswell, and to the said Samuel McClelland, and to that individual of the two who shall survive the other, and to the executor or executors, and administrator or administrators of such survivor in trust for the full payment of the aforesaid debts, each and every portion of the estate and property hereinafter described, whether the estate be real, personal, or mixed, to wit: the unexpired time of service of a colored man, named Ambrose, who is to be discharged from servitude when he shall have refunded by his labor, estimated at a fair price, the money which he has cost and may yet cost the subscriber; the unexpired time of service of a colored servant, named Jesse, who is to be free when he shall have completed the 21st year of his age; the unexpired time of the service of a colored servant woman, named Eliza; a debt due to the subscriber in an open book account from the president and trustees of Marion College, in Missouri, believed in equity to amount

at least to fifteen thousand dollars, whether the same prove to be more or less; five mares; one iron-gray horse; one black horse, bought for Ambrose; one horse colt; a quantity of brick, now on the college farm, supposed to amount to 30,000, be the same more or less; all the hay, corn and oats belonging to the subscriber; ten yoke of oxen or steers; three bulls, eight cows, three calves; one young steer and two yearling heifers on the farm on which the subscriber now lives; a flock of about 20 sheep, with about 50 swine, and a herd of young cattle, now on the farm under the care of Benjamin Ashburner; a herd of swine which Michael Monk has contracted to deliver to the subscriber; all the rent due, or until the expiration of this mortgage to become due from any of the houses and lands of the subscriber, situate in the State of Missouri, with all the increase and issues of his mares, cattle, and swine, and cultivated fields; one surveyor's compass; one chaise; one dearborn wagon; one 2 horse wagon, with elliptical springs; one ox wagon; one ox cart; sundry ox-yokes and chains; seven ploughs; one harrow with iron teeth; one cultivator; one patent revolving rake; sundry hoes; pickaxes; axes; saws; spades; shovels; hand rakes, and 12 scythes with their schnathes; two sets of double horse harness; two harnesses for a single horse; a library of theological, medical, scientific and other books, worth six thousand dollars; four silver tumblers; one silver castor; one silver cake-basket; one silver coffee-pot; two silver tea-pots; one silver slop-bowl; one silver sugar-bowl; one silver cream vessel; one silver soup-ladle; one silver sugar-tongs; two silver sauce ladles; two silver butter-knives; a variety of large and small silver spoons; sundry silver forks; one iron fire-proof chest; three mahogany bedsteads; three bureaus; two mahogany and two walnut tables; one large looking-glass; two dressing-glasses; ten cane-bottomed chairs; sundry Windsor chairs; four carpets; three iron stoves; one fine wardrobe; one book-case and desk; four pair of handirons, with as many shovels and tongs; a variety of knives and forks, tubs, kettles, crockery, and other household and kitchen furniture; a debt of three thousand dollars due from William Muldrow; a debt of $500 due from Samuel Dunahower; a debt of five hundred dollars due from Joseph H. Hampton; a debt of $500 due from Samuel Carswell Ely; a debt of $1000 due from the late firm of Ely, Walton & Hendricks; a debt due from Paul Hunter; a debt of $500 due from Robert J. Smith; a debt of $500 due from William R. Dowling; a debt from Crigmere, Cremsley & Miley, of about one thousand dollars; all that tract of land known as the northwest quarter of the northeast quarter of section No. 25, in township No. 57, north of the base line in range No. 8 west, of the 5th principal meridian, in the district of land offered for sale at Palmyra, in Missouri; the southwest quarter of section No. 7, in township No. 58 north, in range No. 7 west, as above; the southeast quarter of the southeast quarter of section No. 26; the west half of the southeast

quarter of section No. 26; the east half of the northeast quarter of section No. 27; the west half of the southwest quarter of section No. 26; and the west half of the northwest quarter of section No. 36, all in township No. 57 north, in range No. 7 west, which John Moss, Jr., conveyed to the subscriber; the east half of the southwest quarter of section No. 33, in township No. 58 north, in range No. 5 west, of the 5th principal meridian; the east half of the northeast quarter of section No. 17, in township No. 38 north, in range No. 5 west; the fractional section No. 22, in township No. 59 north, in range No. 5 west, as above; the southeast fractional quarter of section No. 28, in township No. 59 north, in range No. 5 west, together with the two framed houses thereon erected; the west half of section No. 28, in township No. 59 north, in range No. 5 west; the southwest quarter of section No. 3, in township No. 56 north, in range No. 6 west; the east half of the southeast quarter of section No. 4, in township No. 56 north, in range No. 6 west; the west half of the southeast quarter of section No. 4, in township No. 56 north, in range No. 6 west; the northwest quarter of section No. 3, and the northeast quarter of section No. 4, and the east half of the northwest quarter of section No. 4, in township No. 56 north, in range No. 6 west; the east half of the southwest quarter and the east half of the southeast quarter, and the southwest quarter of the southeast quarter of section No. 33, in township No. 37 north, in range No. 6 west; the north half of section No. 33, in township No. 57 north, in range No. 6 west; the west half of the northwest quarter of section No. 34, in township No. 57 north, in range No. 6 west, together with the buildings thereon erected; seventeen acres and a half of this tract, sold to James G. Eaton and Sarah Baldwin, being exempted from this grant; all those four hundred and forty-seven acres of land, except 5 acres sold to J. C. Beaty, 5 acres to Alexander J. Dallas, and 5 acres to Benjamin Pyatt, situate in sections No. 20 and 21, in township No. 57 north, in range No. 6 west, which Rhodes Gentry and wife conveyed to the subscriber, together with all the buildings thereon erected, subject only to a mortgage debt of 2886 dollars, with interest, payable to Reverend James Gallaher, his heirs and assigns; sixty acres, more or less, remaining unsold in a tract of land in Marion County, which James Thomas conveyed to the subscriber by deed, recorded in Deed Book 6, at page 405, in the proper office at Palmyra, together with the two new frame houses and blacksmith shops erected thereon; the northeast quarter of the northeast quarter of section No. 29, in township No. 57 north, in range No. 6 west; that certain lot or tract of land, containing ten acres, lying in a piece twenty rods wide from east to west, and eighty rods deep from north to south, on the west side of the northeast quarter of the southeast quarter of section No. 34, in township No. 57 north, in range No. 6 west, which John McKee and wife and Samuel Muldrow conveyed to the subscriber, bounded on the north side by land belonging

to Marion College; on the west side by land of Margaret Carswell, and on the east and west side by land lately belonging to the said John McKee and Samuel Muldrow.

All that certain tract of land in Marion county, containing twelve acres and one-tenth of an acre, together with two brick houses, and their appurtenances, erected thereon, which Daniel Bradley and Hannah, his wife, conveyed to the subscriber agreeably to deed recorded in deed book C., at pages 327 and 328, in the proper office in Palmyra; two certain lots of land lying in the town of Palmyra, together with the houses thereon erected, known as lots Nos. 5 and 6, in block No. 26, in the plat of said town, which John C. Pickett and wife conveyed to the subscriber; and also three certain lots of land situate in Palmyra aforesaid, together with all the buildings thereon erected, known as lots Nos. 4, 5, and 6, in block No. 47, in the plat of Dickerson's addition to the town of Palmyra, which lots John G. Forgueron and wife conveyed to the subscriber. This indenture witnesseth moreover, that each and every portion of the aforementioned property or estate is granted, sold, bargained, and conveyed to the before-named mortagee and mortgagees, the said Margaret Carswell and Samuel McClellan, in trust aforesaid, subject to the following condition, that if within five years from the date of this instrument of writing the subscriber, Ezra Stiles Ely, or his heirs, executor or executors, administrator or administrators, or any or either of them, shall well and truly pay each and every portion of the above-named debts, due and to become due to the aforesaid ward, Mary Ann Ely Carswell, and the heirs of Clement Lee Bready, deceased, or to their lawful representatives of such of said wards as may at that time be minors still, then and in that case this indenture of mortgage shall become and forever thereafter remain null and void; otherwise it shall be and remain in full force forever.

In witness whereof I have hereunto set my hand and seal at West Ely, in the county of Marion, in the State of Missouri, on the 5th day of January, in the year of our Lord one thousand eight hundred and thirty-eight.

E. S. ELY. [SEAL.]

Signed, sealed and delivered in the presence of us, the subscribing witnesses,

GEO. SCHROTER,
MATHEW HASTINGS,
JOHN R. MCMULLIN.

Which is now here to the court shown. Your petitioners aver that the whole of said debt of thirty-four thousand dollars, mentioned in said mortgage, remains unpaid, and is still due and owing, and they pray that the said Ely may be made defendant to this petition, and that summons may issue, and he be summoned to answer this petition,

and that this mortgage be foreclosed, and the equity of redemption of the said Ely be barred, and that judgment be rendered against him for the amount of said debt, and against the mortgaged property, and it be sold to satisfy said debt, interest, and costs, &c.

D. C. TUTTLE,
Attorney for Petitioners.

Filed August 23d, 1843.

JOHN P. RUTTER,
Clerk.

(Attached to said petition is a paper in the words and figures following, to wit:)

*Power of Attorney, Ely to Wright.*

State of Missouri, County of Marion. Marion Circuit Court, August Term, 1843.

To Uriel Wright, attorney at law:

These are to authorize and empower you to appear in the Marion Circuit Court as attorney for the undersigned, Ezra Stiles Ely, D. D., and for me and in my name to receive a petition to foreclose a mortgage at the suit of Margaret Carswell, widow, and Samuel McClellan, plaintiffs, M. D., and thereupon to confess the plaintiffs' cause of action for thirty-four thousand dollars damages, and the mortgage to be foreclosed for the amount aforesaid, and judgment against the property mentioned in the said mortgage be rendered against this defendant, and that execution may issue against said property, and that it may be sold to satisfy the damages aforesaid and all costs, hereby releasing all errors and imperfections in the premises, and ratifying and confirming all and singular whatever my attorney may lawfully do for me and in my name. Witness my hand and seal this 21st day of August, A.D. 1843.

EZRA STILES ELY. [SEAL.]

By virtue of the within power of attorney, I hereby confess the plaintiffs' cause of action for thirty-four thousand dollars, and that judgment may be rendered against the mortgaged property, and be sold to satisfy the judgment and costs, &c.

EZRA STILES ELY,
By his attorney in fact,
URIEL WRIGHT.

And afterwards, to wit, on the 23d day of August, 1843, at a Circuit Court continued and held at the court-house in the town of Palmyra, being during the August term 1843 of the Circuit Court for Marion County, in the State of Missouri, before the Honorable P. H. McBride, judge of said Circuit Court, the following, amongst other proceedings, were had, to wit:

*Confession and Judgment of Foreclosure.*

MARGARET CARSWELL and SAMUEL MCCLELLAND, petitioners,
*v.*
EZRA STILES ELY, defendant.

Petition to foreclose Mortgage.

And now at this day come the petitioners and file their mortgage and petition to foreclose the same; whereupon comes the said defendant Ezra Stiles Ely, by his attorney Uriel Wright, and confesses the cause of action of said petitioners for the sum of thirty-four thousand dollars, and consents that his equity of redemption in the mortgaged property may be foreclosed; therefore it is considered by the court that the said petitioners do have and recover against the said defendant the sum of thirty-four thousand dollars in damages, and also their costs and charges by them about their suit in this behalf expended; and is further considered by the court that the equity of redemption of the said defendant in the mortgaged premises be and the same is hereby foreclosed, which said property is as follows: the unexpired time of service of a colored man named Ambros, who is to be discharged from servitude when he shall have refunded by his labor, estimated at a fair price, the money which he has cost and may yet cost; the unexpired time of service of a colored servant named Jesse, who is to be free when he shall have completed the 21st year of his age; the unexpired time of the service of a colored woman named Melinda; the unexpired time of service of a colored servant woman named Eliza; a debt due on an open book account from the president and trustees Marion College, supposed to be about fifteen thousand dollars, more or less; five mares; one iron-gray horse; one black horse bought for Ambros; one horse colt; a quantity of brick on the college farm, supposed to amount to thirty thousand, be the same more or less; all the hay, corn, and oats belonging to said defendant; ten yoke of oxen or steers, three bulls, eight cows, three calves, one young steer, two yearling heifers on the farm of said defendant; about twenty sheep, about fifty swine, and a herd of young cattle, also on the farm of said defendant, under the care of Benjamin Ashburner; a herd of swine at this time in the possession of Michael Monk, which he has contracted to deliver to said defendant; all the rent due, or to become due before the expiration of this mortgage, from any of the houses and lands of said defendant situated in this State, with all the issues and increase of his mares, cattle, and swine, and cultivated fields; one surveyor's compass; one chaise; one dearborn wagon; one two-horse wagon, with elliptical springs; one ox-wagon; one ox-cart; sundry ox-yokes and chains; seven plows; one harrow, with iron teeth; one cultivator; one patent revolving rake; sundry hoes, pickaxes, axes, saws, spades, shovels, hand-rakes,

and twelve scythes with their snathes; two sets of double horse harness; two harnesses for single horse; a library of theological, medical, scientific, and other books, worth six thousand dollars; four silver tumblers; one silver castor; one silver cake-basket; one silver coffee-pot; two silver teapots; one silver slop-bowl; one silver sugar-bowl; one silver cream-vessel; one silver soup-ladle; one silver sugar-tongs; two silver sauce-ladles; two silver butter-knives; a variety of large and small silver spoons; sundry silver forks; one iron fire proof chest; three mahogany bedsteads; three bureaus; two mahogany and two walnut tables; one large looking-glass; two dressing-glasses; ten cane-bottomed chairs; sundry windsor chairs; four carpets; three iron stoves; one fine wardrobe; one book-case and desk; four pair of andirons, with as many shovels and tongs; a variety of knives, forks, tubs, kettles, crockery, and other household and kitchen furniture; a debt of three thousand dollars due from William Muldrow; a debt of five hundred dollars due from Samuel Dunnahower; a debt of five hundred dollars due from Joseph M. Hampton; a debt of five hundred dollars due from Samuel Carswell Ely; a debt one thousand dollars due from the late firm of Ely, Watton & Hendricks; a debt due from Paul Hunter; a debt of five hundred dollars due from Robert I. Smith; a debt of five hundred dollars due from William R. Downing; a debt from Crissmill, Crumley & Miley of about one thousand dollars.

All that tract of land known as the northwest quarter of the northeast quarter of section No. 25, in township No. 57, north of the base line in range No. 8 west of the 5th principal meridian, in the district of land offered for sale at Palmyra in Missouri; the southwest quarter of section No. 7, in township No. 58 north, in range No. 7 west, as above; the southeast quarter of the southeast quarter of section No. 26; the west half of the southeast quarter of section No. 26; the east half of the northeast quarter of section No. 27; the west half of the southwest quarter of section No. 26; and the west half of the northwest quarter of section No. 36, all in township No. 57 north, in range No. 7 west, which John Moss, Jr., conveyed to the defendant; the east half of the southwest quarter of section No. 33, in township No. 58 north, in range No. 5 west, of the fifth principal meridian; the east half of the northeast quarter of section No. 17, township No. 38 north, in range No. 5 west; fractional section No. 22, in township No. 59 north, in range No. 5 west, as above; the southeast fractional quarter of section No. 28, in township No. 59 north, in range No. 5 west, together with the two framed houses thereon erected; the west half of section No. 28, in township No. 59 north, in range No. 5 west; the southwest quarter of section No. 3, in township No. 56 north, in range No. 6 west; the east half of the southeast quarter of section 4, in township No. 56 north, in range No. 6 west; the west half of the southeast quarter of section No. 4, in township No. 56 north, in range No. 6 west; the northwest

quarter of section No. 3, and the northeast quarter of section No. 4, and the east half of the northwest quarter of section No. 4, in township No. 56 north, in range No. 6 west; the east half of the southwest quarter, and the east half of the southeast quarter, and the southwest quarter of the southeast quarter of section No. 33, in township No. 57 north, in range No. 6 west; the north half of section No. 33, in township No. 57 north, in range No. 6 west; the west half of the northwest quarter of section No. 34, in township No. 57 north, in range No. 6 west, together with the buildings thereon erected, except seventeen acres and a half sold to J. G. Eaton and S. Baldwin, four hundred and forty-seven acres of land conveyed to the said defendant by Rodes Gentry and wife, in township No. 57, in range No. 6 west, except five acres sold to J. C. Beatty, five acres to Alexander J. Dallas, five acres to Benjamin Pyatt, in sections No. 20 and 21, in said township and range, together with all the buildings on said land, subject to a mortgage debt of $2886, due to James Gallaher; sixty acres, more or less, conveyed by James Thomas to defendant, with two framed buildings and a blacksmith-shop; the northeast quarter of the northeast quarter of section No. 29, in township No. 57 north, in range No. 6 west; ten acres of land, being twenty rods from east to west, and eighty rods from north to south, on the west side of the northeast quarter of the southeast quarter of section No. 34, in town No. 57 north, in range No. 6 west; twelve acres and one-tenth of an acre, together with two brick houses and appurtenances, conveyed by Daniel Bradley and wife to defendant, adjoining the town of Palmyra; lots 5 and 6 in block No. 26, in the town of Palmyra; lots 4, 5, and 6 in block No. 47, in Dickerson's addition to the town of Palmyra, together with the improvements thereon; and it is further considered by the court that the said petitioners may have their writ of execution against the above described property, and in the event that the said above described property shall be insufficient to satisfy the said judgment of thirty-four thousand dollars, then that said petitioners may have their writ of execution against any other property of the said defendant.

And afterwards, to wit, on the sixteenth day of October, 1843, there was issued from the office of the clerk of our said court a writ of execution in the words and figures following, to wit:

State of Missouri, County of Marion, *ss.*

*Execution.*

The State of Missouri to the sheriff of Marion County, greeting: Whereas Margaret Carswell and Samuel McClelland, on the 23d day of August, in the year of our Lord eighteen hundred and forty-three, at our Circuit Court for said county of Marion, recovered against Ezra Stiles Ely the sum of thirty-four thousand dollars

and cents, which to the said Margaret Carswell and Samuel McClelland was adjudged for their damages, and also the sum of eight dollars and five cents costs. These are therefore to command you that of the mortgaged property of the said Ezra Stiles Ely, to wit, the unexpired time of service of a colored man named Ambros, who is to be discharged from servitude when he shall have refunded by his labor, estimated at a fair price, the money which he has cost and may yet cost; the unexpired time of service of a colored servant named Jesse, who is to be free when he shall have completed the 21st year of his age; the unexpired time of service of a colored woman named Melinda; the unexpired time of service of a colored servant woman named Eliza; a debt due on an open book account from the president and trustees of Marion College, supposed to be about fifteen thousand dollars, more or less; five mares, one iron-gray horse, one black horse bought for Ambros, one horse colt, a quantity of brick on the college farm, supposed to amount to thirty thousand, be the same more or less; all the hay, corn, and oats belonging to said defendant; ten yoke of oxen or steers, three bulls, eight cows, three calves, one young steer, two yearling heifers on the farm of said defendant; about twenty sheep, about fifty swine, and a herd of young cattle, also on the farm of said defendant, under the care of Benjamin Ashburner; a herd of swine at this time in the possession of Michael Munk, which he has contracted to deliver to said defendant; all the rent due, or to become due before the expiration of this mortgage, from any of the houses and lands of said defendant situated in this State, with all the issues and increase of his mares, cattle, swine, and cultivated fields; one surveyor's compass, one chaise, one dearborn wagon, one two-horse wagon with elliptical springs, one ox-wagon, one ox-cart, sundry ox-yokes and chains, seven plows, one harrow with iron teeth, one cultivator, one patent revolving rake, sundry hoes, pickaxes, axes, saws, spades, shovels, hand-rakes, and twelve scythes with their schnathes, two sets of double horse harness, two harnesses for single horse, a library of theological, medical, scientific, and other books, worth six thousand dollars; four silver tumblers, one silver castor, one silver cake-basket, one silver coffee-pot, two silver teapots, one silver slop-bowl, one silver sugar-bowl, one silver cream-vessel, one silver soup-ladle, one silver sugar-tongs, two silver sauce-ladles, two silver butter-knives, a variety of large and small silver spoons, sundry silver forks, one iron fire-proof chest, three mahogany bedsteads, three bureaus, two mahogany and two walnut tables, two large looking-glasses, two dressing-glasses, ten cane-bottomed chairs, sundry Windsor chairs, four carpets, three iron stoves, one fine wardrobe, one bookcase and desk, four pair of andirons, with as many shovels and tongs, a variety of knives and forks, tubs, kettles, crockery, and other household and kitchen furniture; a debt of three thousand dollars due from William Muldrow, a debt of five hundred dollars due from

Samuel Dunnahower, a debt of five hundred dollars due from Joseph M. Hampton, a debt of five hundred dollars due from Samuel Carswell, a debt of one thousand dollars due from the late firm of Ely, Walton & Hendricks, a debt due from Paul Hunter, a debt of five hundred dollars due from Robert J. Smith, a debt of five hundred dollars due from William R. Dowling, a debt from Crigmere, Cromley & Miley of about one thousand dollars.

All that tract of land known as the northwest quarter of the northeast quarter of section No. 25, in township No. 57, north of the base line in range No. 8 west, of the fifth principal meridian, in the district of land offered for sale at Palmyra, in Missouri; the southwest quarter of section No. 7, in township No. 58 north, in range No. 7 west, as above; the southeast quarter of section No. 26, the west half of the southeast quarter of section No. 26, the east half of the northeast quarter of section No. 27, the west half of the southwest quarter of section No. 26, and the west half of the northwest quarter of section No. 36, all in township No. 57 north, in range No. 7 west, which John Moss, Jr., conveyed to the defendant; the east half of the southwest quarter of section No. 33, in township No. 58 north, in range No. 5 west, of the 5th principal meridian; the east half of the northeast quarter of section No. 17, township No. 58 north, in range No. 5 west; fractional section No. 22, in township No. 59 north, in range No. 5 west, as above; the southeast fractional quarter of section No. 28, in township No. 59 north, in range No. 5 west, together with the two frame houses thereon erected; the west half of section No. 28, in township No. 59 north, in range No. 5 west; the southwest quarter of section No. 3, in township No. 56 north, in range No. 6 west; the east half of the southeast quarter of section 4, in township No. 56 north, in range No. 6 west; the northwest quarter of section No. 3, and the northeast quarter of section No. 4, and the east half of the northwest quarter of section No. 4, in township No. 56 north, in range No. 6 west; the east half of the southwest quarter, and the east half of the southeast quarter, and the southwest quarter of the southeast quarter of section No. 33, in township No. 57 north, in range No. 6 west; the north half of section No. 33, in township No. 57 north, in range No. 6 west; the west half of the northwest quarter of section No. 34, in township No. 57 north, in range No. 6 west, together with the buildings thereon erected, except seventeen acres and a half, sold to I. G. Eaton and S. Baldwin, four hundred and forty-seven acres of land, conveyed to said defendant by Rodes Gentry and wife, in township No. 57, in range No. 6 west, except five acres sold to J. C. Beaty, five acres to Alexander J. Dallas, and five acres to Benjamin Pyatt, in sections 20 and 21, in said township and range, together with all the buildings thereon; the same being subject to a mortgage debt of 2886 dollars, due to James Gallaher; sixty acres, more or less, conveyed by James Thomas to de-

fendant, with two frame buildings and a blacksmith shop; the northeast quarter of the northeast quarter of section No. 29, in township No. 57 north, in range No. 6 west; ten acres of land, being twenty rods from east to west, and eighty rods from north to south, on the west side of the northeast quarter of the southeast quarter of section No. 34, in township No. 57 north, in range No. 6 west; twelve acres and one-tenth of an acre, together with two brick houses and appurtenances, as conveyed by Daniel Bradley and wife to defendant, adjoining the town of Palmyra; lots 5 and 6 in block No. 26, in the town of Palmyra; lots 4, 5, and 6, in block No. 47, in Dickerson's addition to the town of Palmyra, together with the improvements thereon; and in the event that said above-described property shall be insufficient the said judgment, then of any other property of said defendant you cause to be made the damages and costs aforesaid, and that you have the same before the judge of our said court on the first Monday in November next, to satisfy said damages and costs; and that you have then there this writ, certifying how you have executed the same.

Witness John P. Rutter, clerk of our said court, and the [SEAL.] seal thereof. Done at office in Palmyra, at the county aforesaid, on this sixteenth day of October, A.D. 1843.

JOHN P. RUTTER,
Clerk.

Attached to which said execution is a paper in the words and figures following, to wit:

*Notice of Sale.*

"Sheriff's Sale."

In virtue and by authority of an execution issued from the office of the clerk of the Circuit Court of the County of Marion, Missouri, and to me directed, in favor of Margaret Carswell and Samuel McClellan against Ezra Stiles Ely, I have levied upon and seized all the right, title, interest, and claim of the said Ely in and to the following described real estate, to wit: all that tract of land known as the northwest quarter of the northeast quarter of section No. 25 in township No. 57, north of the base line in range No. 8 west, of the 5th principal meridian, in the district of land offered for sale at Palmyra, in Missouri; the southwest quarter of section No. 7, in township No. 58 north, in range No. 7 west, as above; the southeast quarter of the southeast quarter of section No. 26; the west half of the southeast quarter of section No. 26; the east half of the northeast quarter of section No. 27; the west half of the southwest quarter of section No. 26, and the west half of the northwest quarter of section No. 36, all in township No. 57 north, in range No. 7 west, which John Moss, Jr., conveyed to the defendant; the east

half of the southwest quarter of section No. 33, in township No. 58 north, in range No. 5 west, of the 5th principal meridian; the east half of the northeast quarter of section No. 17, township No. 58 north, in range No. 3 west; fractional section No. 22, in township No. 59 north, in range No. 5 west, as above; the southeast fractional quarter of section No. 28, in township No. 59 north, in range No. 5 west, together with the two frame houses thereon erected; the west half of section No. 28, in township No. 59 north, in range No. 5 west; the east half of the southwest quarter, and the east half of the southeast quarter, and the southwest quarter of the southeast quarter, of section No. 33, in township No. 57 north, in range No. 6 west; the north half of section No. 33, in township No. 57 north, in range No. 6 west; the west half of the northwest quarter of section No. 34, in township No. 57 north, in range No. 6 west, together with the buildings thereon erected, except seventeen acres and a half, sold to J. G. Easton and S. Baldwin; four hundred and forty-seven acres of land conveyed to the said defendant by Rodes Gentry and wife, in township No. 57, in range No. 6 west, except 5 acres sold to J. C. Beaty, 5 acres to Alexander J. Dallas, and 5 acres to Benjamin Pyatt, in sections 20 and 21, in said township and range, together with all the buildings on said land, the same being subject to a mortgage debt of 2886 dollars, due to James Gallaher; sixty acres, more or less, conveyed by James Thomas to defendant, with two frame buildings and a blacksmith shop; the northeast quarter of the northeast quarter of section No. 29, in township No. 57 north, in range No. 6 west; ten acres of land, being twenty rods from east to west, and 80 rods from north to south, on the west side of the northeast quarter of the southeast quarter of section No. 34, in township No. 57 north, in range No. 6 west; twelve acres and one-tenth of an acre, together with two brick houses and appurtenances, conveyed by Daniel Bradley and wife to defendant, adjoining the town of Palmyra; lots 5 and 6, in block No. 26, in the town of Palmyra; lots 4, 5, and 6, in block No. 47, in Dickerson's addition to the town of Palmyra, together with the improvements thereon, together with all the buildings and improvements thereunto belonging, and will sell the same (subject to all prior liens and judgments) to the highest bidder, for ready money, at the court-house door in the town of Palmyra, in the county and State aforesaid, on Friday, the 17th day of November next, between the hours of nine and five o'clock of that day, to satisfy said execution and costs.

JORDAN J. MONTGOMERY,
Sheriff of Marion County.

October 21st, 1843.

And annexed to which said execution is a paper in the words and figures following, to wit:

State of Missouri, County of Marion, *sct.*

*Sheriff's Return.*

I hereby certify, that by virtue of this execution, I levied upon all the lands mentioned in the within writ, lying in Marion county aforesaid, and did expose the same to sale at the court-house door, in the town of Palmyra, on the 7th day of November, 1843, during the term of the Circuit Court for said county, after having previously given notice of the time and place, and what real estate was to be sold, by six handbills, signed by me, least twenty days before the day of sale, and put up in public places in different parts of the county. A bill of said sale is herewith returned with the names of the purchasers and the amount bid for each tract, to wit:

*Sale Bill.*

A sale bill, containing a description or numbers of land, the price bid, and the names of the purchasers of each tract sold under or by virtue of an execution in favor of Margaret Carswell and Samuel McClelland against Ezra Stiles Ely, on the 17th day of November, A.D. 1843.

| Names of Purchasers. | | | | Price. |
|---|---|---|---|---|
| 160 acres, the S.W. qr. of sec. 7, township 58 and range 7 west, purchased by Carty Wells and S. T. Glover, at one dollar, | | | | $1 00 |
| 320 acres, the west half of sec. 28, township 59, and range 5 west, Wells and Glover, | | | | 2 00 |
| $34\frac{63}{100}$ S. E. fr. qr. s. 28, town. 59, range 5 W., Wells and Glover, | | | | 50 |
| Lots 5 and 6, in block 26, in Palmyra, S. McClelland, | | | | 1 00 |
| 13 acres pt. W. ½ N.W. qr. sec. 34, town. 57, range 6, Arthur Roach, 3 acres pt. W. ½ N.W. qr. sec. 33, T. 57, R. 6, Arthur Roach, | | | | 50 |
| 48 acres W. ½ N.W. | 34, T. 57, R. 6, | S. McClelland, | | 50 |
| N.W. ¼ N. E. qr. | 25, T. 57, R. 8, | do | | 50 |
| S. E. ¼ S. E. | 26, T. 57, R. 7, | do | | 50 |
| W. ½ S. E. | 26, T. 57, R. 7, | do | | 50 |
| E. ½ N. E. | 27, T. 57, R. 7, | do | | 50 |
| W. ½ S.W. | 26, T. 57, R. 7, | do | | 50 |
| W. ½ N.W. | 36, T. 57, R. 7, | do | | 50 |
| E. ½ S.W. | 33, T. 58, R. 5, | do | | 50 |
| E. ½ N. E. | 17, T. 58, R. 5, | do | | 50 |
| Fil. | sec. 22, T. 59, R. 5, | do | | 50 |
| E. ½ S.W. | sec. 33, T. 57, R. 6, | do | | 50 |
| | | | | 5 50 |
| | | | Carried to next page, | $10 50 |

| | | | |
|---|---|---|---|
| | Amount brought forward. | | $10 50 |
| E. ½ S. E. qr. sect. | 33, T. 57, R. 6, W., | S. McClelland, | 50 |
| S.W. S. E. | 33, T. 57, R. 6, | do | 50 |
| N. ½ sec. | 32, T. 57, R. 6, | do | 50 |
| 60 acres pt. W. ½, sold by Thomas W. Ely to | | do | 50 |
| N. E. ¼ N. E. qr. sec. 29, T. 57, R. 6. | | do | 75 |
| 10 pt. N.E. ¼ S.E. qr. sec. 34, T. 57, R. 6. | | do | 50 |
| Lots No. 4, 5, and 6, in block No. 47, in Dickerson's addition to the town of Palmyra, | | do | 50 |
| 447 acres conveyed to Ely by Gentry, . . . . | | | 50 |
| | | | $14 75 |

Amounting in the aggregate, to fourteen dollars and seventy-five cents. There being no other property found, the annexed execution is returned unsatisfied.

J. J. MONTGOMERY,
Sheriff M.

*Amended Return.*

By way of amendment to the above return, and from a written memorandum in my possession, as well as from my recollection of the facts, I hereby certify that I did levy upon, seize, and sell, in manner and form as above, the following real estate, to wit: twelve acres and one-tenth of an acre, together with two brick houses and appurtenances, conveyed by Daniel Bradley and wife to defendant, adjoining the town of Palmyra, when and where, to wit, on the day of sale above named, Samuel T. Glover and Carty Wells being the highest bidders, became the purchasers thereof, at the sum of twelve dollars and ten cents.

J. J. MONTGOMERY,
Late Sheriff of Marion county, M.

August 15th, 1848.

And accompanying said execution is a paper in the words and figures following, to wit:

*Notice of Sale.*

"Sheriff's Sale."

In virtue and by authority of an execution issued from the office of the clerk of the Circuit Court of the County of Marion, Missouri, to me directed, in favor of Margaret Carswell and Samuel McClelland against Ezra Stiles Ely, I have levied upon and seized all the right, title, interest, and claim, of the said Ely, in and to the following property, to wit:

A library of theological, medical, scientific, and other books; 3 bureaus, 2 mahogany and two marble tables, one cultivator, 3 mahogany bedsteads, 2 large looking-glasses, sundry windsor and cane-bottomed chairs, 4 carpets, 2 iron stoves, 1 pine wardrobe, one book-case and desk, sundry maple bedsteads, four pair of andirons and 2

pairs of shovels and tongs, a variety of crockeryware, knives and forks, tubs, beds, mattresses, and other household and kitchen furniture; some window frames and sash, and a variety of pine lumber in the barn, and will sell the same to the highest bidder for ready money at the residence of E. S. Ely, in West Ely, in the county and State aforesaid, on Friday, the 26th January, 1844, between the hours of 9 and 5 o'clock of that day, to satisfy said execution and costs.

J. J. MONTGOMERY,
Sheriff of Marion county.

November 2d, 1843.

("Attached to which said paper is the following:")

*Sale Bill.*

A list of articles sold at the residence of Ezra Stiles Ely, on the 26th day of January, A.D. 1844, levied upon and sold as the property of said Ely, by virtue of an execution *v.* said Ely, in favor of Margaret Carswell and Samuel McClelland:

| | | |
|---|---|---|
| Books: Cruder's Concordance, and 2 copies Hebrew Bible, | Purchaser (Shroter), | $0 75 |
| Latin Vulgate, and 3 copies Sept., 7 vols, | George Shroter, | 3 08 |
| Parkhurst's Greek and Eng. Lex'n (1 vol.) | do | 37 |
| Gray's Heb. Lat. and Eng. Lexicon, (2 vols.) | do | 25 |
| Heb. Test. (1 vol.) | do | 12½ |
| Schleusner's Lex., (5 vols.) | do | 3 00 |
| Lardner's works, (5 vols.) | do | 4 35 |
| Robinson's Greek Lexicon, (1 vol.) | do | 1 50 |
| History of Missions, (2 vols.) | do | 50 |
| Gregory's Encyc. (3 vols.) | Patterson, | 3 37½ |
| Sherwood's works, (8 vols.) | Shroter, | 1 50 |
| Parkhurst's Heb. and Eng. Lex., (1 vol.) | do | 25 |
| Robinson's, Pickering's & Gibbs' Lexicons, (3 vols.) | do | 1 20 |
| Religious Remembrancer, (5 vols.) | do | 2 00 |
| Philadelphian, (7 vols.) | do | 4 37½ |
| Repository, (1 vol.) | do | 3 50 |
| Technological Dictionary, (2 vols.) | do | 4 50 |
| Griesbuck Testament, (1 vol.) | do | 75 |
| Ger. Greek and Heb. Concordance, (1 vol.) | do | 25 |
| Museum, (4 vols.) | do | 25 |
| Mather's Magnalia, (2 vols.) | do | 25 |
| Sewell's History, (2 vols.) | do | 12½ |
| Clark's works, (3 vols.) | do | 75 |
| Miscellaneous, (7 vols.) | do | 2 17 |
| do (8 vols.) | do | 2 48 |
| Orbis Pictis, (1 vol.) | do | 1 25 |
| Annotations and Council of Trent, (2 vols.) | do | 2 25 |

| | | |
|---|---|---|
| Buck's Theological Dictionary, (1 vol.) | do | 87 |
| Miscellaneous, (5 vols.) | do | 1 25 |
| do (9 vols.) | do | 1 80 |
| do (16 vols.) | do | 4 96 |
| do (9 vols.) | do | 7 83 |
| do (12 vols.) | do | 75 |
| Barnes' Notes on Romans, | J. Hoombly, | 31 |
| Miscellaneous, (9 vols.) | G. Schroter, | 1 33 |
| do (12 vols.) | do | 1 50 |
| do (8 vols.) | do | 50 |
| do (2 vols.) | do | 1 24 |
| do (12 vols.) | do | 75 |
| do (6 vols.) | do | 5 23 |
| Upham on Will, (1 vol.) | Israel Twombly, | 75 |
| Miscellaneous, (3 vols.) | Schroter, | 18¾ |
| 2 Bureaus, mahogany, | J. H. Patterson, | 3 24 |
| 1 do oak, | do | 1 12½ |
| 1 Bedstead, mahogany, | do | 50 |
| 1 Bedstead, do | do | 1 31 |
| 1 do do | do | 1 62 |
| 1 Carpet, | do | 1 65 |
| 1 do | do | 2 06½ |
| 1 do | do | 5 62½ |
| 2 Mahogany tables, | do | 2 37 |
| 2 Looking-glasses, | do | 3 80 |
| 8 Cane-bottomed chairs, | do | 2 00 |
| 6 Windsor chairs, | do | 48 |
| 1 Carpet, | J. H. Patterson, | 1 12½ |
| 1 Iron stove (10 plate), | do | 1 25 |
| 1 Box stove, | do | 1 12½ |
| 1 Pine wardrobe, | do | 1 06¼ |
| 1 Book case and desk, | do | 1 12½ |
| 1 Pair shovels and tongs, | do | 20 |
| 1 Pair andirons (large), | do | 30 |
| 1 do (small), | do | 25 |
| 1 do do | do | 13 |
| 1 Pair shovels and tongs, | do | 13 |
| 1 Single bedstead, | do | 1 13 |
| 1 Feather bed, | do | 1 80 |
| 1 do | do | 1 00 |
| 2 Mattresses, large, | do | 2 25 |
| 1 do single, | do | 62 |
| 1 do large, | do | 62 |
| 3 do do | do | 3 37½ |
| 3 Beds and furniture, | do | 4 87½ |
| 1 Set knives and forks, | do | 1 12½ |
| 1 Lot crockery, | do | 1 12½ |

| | | |
|---|---|---|
| 1 Set china, | do | 2 25 |
| 1 Doz. cut glass tumblers, | do | 60 |
| 3 Decanters, | do | 50 |
| 1 Lot dishes (dinner), | do | 1 25 |
| 2 Tubs, | do | 16 |
| 1 Copper kettle, | do | 25 |
| 30 Window and door frames, | do | 3 90 |
| Large lot of window sash and pine lumber in barn, | do | 12 00 |
| | | $148 09¼ |
| Add amt. of sales on 20th February, 1844, | | 35 63 |
| | | $183 72 |

J. J. MONTGOMERY,
Sheriff M. C.

(And accompanying which said execution is a paper in the words and figures following, to wit:)

*Notice of Sale.*

Sheriff's Sale.

In virtue and by authority of an execution issued from the office of the clerk of the Circuit Court of the County of Marion, Missouri, and to me directed, in favor of Margaret Carswell and Samuel McClellan, against Ezra Stiles Ely, I have levied upon and seized all the right, title, interest and claim of the said Ely in and to the following property, to wit, 1 horizontal piano forte; 1 perpendicular piano forte; 14 hair-bottomed mahogany chairs; 1 red plush rocking chair; 2 other rocking chairs; 1 plush carpet and rug; 1 bureau with dressing glass; 1 cherry corner cupboard; 3 bureaus; 1 small mantle clock; 1 copper coffee urn, and two large meat boxes; and will sell the same to the highest bidder, for ready money, at the residence of said Ely, in West Ely, in the county and State aforesaid, on Tuesday, the 20th day of February, 1844, between the hours of nine and five o'clock of that day, to satisfy said execution and costs.

J. J. MONTGOMERY,
Sheriff of Marion County.

November 2d, 1843.

(Attached to which last foregoing paper is the following:)

*Sale Bill.*

A list of articles sold at the residence of Ezra Stiles Ely, on the 20th day of February, 1844, levied upon and sold as the property

of said Ely, by virtue of an execution *v.* said Ely, in favor of Margaret Carswell and Samuel McClelland:

| | | |
|---|---|---|
| 1 Piano, horizontal, . . . | (Patterson) | $10 00 |
| 1 do upright, . . . | do | 5 00 |
| 14 Mahogany chairs @ 30 c., . | do | 4 20 |
| 1 Rocking chair (red plush), . | do | 50 |
| 1 do common, . . | do | 30 |
| 1 do green, . . | do | 30 |
| 1 Carpet, fine plush, . . . | do | 7 00 |
| 1 Rug, . . . . . | do | 1 00 |
| 1 Bureau, with dressing-glass, . | do | 2 50 |
| 1 Corner cupboard (cherry), . | do | 50 |
| 1 Bureau @ 75, . . . | do | 75 |
| 1 do do . . . . | do | 75 |
| 1 Clock, mantle, . . . | do | 1 70 |
| 1 Coffee urn (coffee), . . . | do | 62½ |
| 1 Meat box, . . . . | do | 25 |
| 1 do . . . . . | do | 25 |
| | | $35 63½ |

J. J. MONTGOMERY,
Sheriff M. C.

(And on the seventeenth day of October, 1843, there was issued from the office of the clerk of our said court an execution, in the words and figures following, to wit):

*Execution.*

State of Missouri, County of Marion, *ss.*

The State of Missouri to the Sheriff of Ralls County, greeting:

Whereas Margaret Carswell and Samuel McClellan, on the 23d day of August, in the year of our Lord eighteen hundred and forty-three, at our Circuit Court for said County of Marion, recovered against Ezra Stiles Ely the sum of thirty-four thousand dollars cents, which to the said Margaret Carswell and Samuel McClellan was adjudged for their damages, and also the sum of eight dollars and twenty-five cents costs. These are, therefore, to command you that of the goods and chattels and real estate of the said Ezra Stiles Ely, to wit, the mortgaged property as follows, to wit: the unexpired time of a colored man, named Ambrose, who is to be discharged from servitude when he shall have refunded by his labor, estimated at a fair price, the money which he has cost, and may yet cost; the unexpired time of service of a colored servant, named Jesse, who is to be free when he shall have completed the 21st year of his age;

| | | |
|---|---|---|
| 1 Set china, | do | 2 25 |
| 1 Doz. cut glass tumblers, | do | 60 |
| 3 Decanters, | do | 50 |
| 1 Lot dishes (dinner), | do | 1 25 |
| 2 Tubs, | do | 16 |
| 1 Copper kettle, | do | 25 |
| 30 Window and door frames, | do | 3 90 |
| Large lot of window sash and pine lumber in barn, | do | 12 00 |
| | | $148 09¼ |
| Add amt. of sales on 20th February, 1844, | | 35 63 |
| | | $183 72 |

J. J. MONTGOMERY,
Sheriff M. C.

(And accompanying which said execution is a paper in the words and figures following, to wit:)

*Notice of Sale.*

Sheriff's Sale.

In virtue and by authority of an execution issued from the office of the clerk of the Circuit Court of the County of Marion, Missouri, and to me directed, in favor of Margaret Carswell and Samuel McClellan, against Ezra Stiles Ely, I have levied upon and seized all the right, title, interest and claim of the said Ely in and to the following property, to wit, 1 horizontal piano forte; 1 perpendicular piano forte; 14 hair-bottomed mahogany chairs; 1 red plush rocking chair; 2 other rocking chairs; 1 plush carpet and rug; 1 bureau with dressing glass; 1 cherry corner cupboard; 3 bureaus; 1 small mantle clock; 1 copper coffee urn, and two large meat boxes; and will sell the same to the highest bidder, for ready money, at the residence of said Ely, in West Ely, in the county and State aforesaid, on Tuesday, the 20th day of February, 1844, between the hours of nine and five o'clock of that day, to satisfy said execution and costs.

J. J. MONTGOMERY,
Sheriff of Marion County.

November 2d, 1843.

(Attached to which last foregoing paper is the following:)

*Sale Bill.*

A list of articles sold at the residence of Ezra Stiles Ely, on the 20th day of February, 1844, levied upon and sold as the property

of said Ely, by virtue of an execution *v.* said Ely, in favor of Margaret Carswell and Samuel McClelland:

| | | |
|---|---|---|
| 1 Piano, horizontal, . . . | (Patterson) | $10 00 |
| 1 do upright, . . . | do | 5 00 |
| 14 Mahogany chairs @ 30 c., . | do | 4 20 |
| 1 Rocking chair (red plush), . | do | 50 |
| 1 do common, . . | do | 30 |
| 1 do green, . . | do | 30 |
| 1 Carpet, fine plush, . . . | do | 7 00 |
| 1 Rug, . . . . . | do | 1 00 |
| 1 Bureau, with dressing-glass, . | do | 2 50 |
| 1 Corner cupboard (cherry), . | do | 50 |
| 1 Bureau @ 75, . . . | do | 75 |
| 1 do do . . . . | do | 75 |
| 1 Clock, mantle, . . . | do | 1 70 |
| 1 Coffee urn (coffee), . . . | do | 62½ |
| 1 Meat box, . . . . | do | 25 |
| 1 do . . . . . | do | 25 |
| | | $35 63½ |

J. J. MONTGOMERY,
Sheriff M. C.

(And on the seventeenth day of October, 1843, there was issued from the office of the clerk of our said court an execution, in the words and figures following, to wit):

*Execution.*

State of Missouri, County of Marion, *ss.*

The State of Missouri to the Sheriff of Ralls County, greeting:

Whereas Margaret Carswell and Samuel McClellan, on the 23d day of August, in the year of our Lord eighteen hundred and forty-three, at our Circuit Court for said County of Marion, recovered against Ezra Stiles Ely the sum of thirty-four thousand dollars cents, which to the said Margaret Carswell and Samuel McClellan was adjudged for their damages, and also the sum of eight dollars and twenty-five cents costs. These are, therefore, to command you that of the goods and chattels and real estate of the said Ezra Stiles Ely, to wit, the mortgaged property as follows, to wit: the unexpired time of a colored man, named Ambrose, who is to be discharged from servitude when he shall have refunded by his labor, estimated at a fair price, the money which he has cost, and may yet cost; the unexpired time of service of a colored servant, named Jesse, who is to be free when he shall have completed the 21st year of his age;

the unexpired time of the service of a colored woman, named Melinda; the unexpired time of service of a colored servant woman, named Eliza; a debt due on open book account from the president and trustees of Marion college, supposed to be about fifteen thousand dollars, more or less; five mares, one iron-gray horse, one black horse, bought for Ambrose, one horse colt; a variety of brick on the college farm, supposed to amount to thirty thousand, be the same more or less; all the hay, corn and oats belonging to said defendant; ten yoke of oxen or steers, three bulls, eight cows, three calves, one young steer, two yearling heifers, on the farm of said defendant; about 20 sheep, about 50 swine, and a herd of young cattle, also on the farm of said defendant, under the care of Benjamin Ashburner; a herd of swine at this time in the possession of Michael *Michael* Munk, which he has contracted to deliver to said defendant; all the rent due or to become due before the expiration of this mortgage from any of the houses and lands of said defendant, situated in this State, with all the issues and increase of his mares, cattle and swine, and cultivated fields; one surveyor's compass, one chaise, one dearborn wagon, one two horse wagon, with elliptical springs; one ox-wagon, one ox-cart, sundry ox-yokes and chains; seven plows, one harrow, with iron teeth, one cultivator, one patent revolving rake, sundry hoes, pickaxes, axes, saws, spades, shovels, hand-rakes, and twelve scythes, with their schnathes; two sets of double horse harness, two harnesses for single horse; a library of theological, medical, scientific and other books, worth six thousand dollars; four silver tumblers, one silver castor, one silver cake basket, one silver coffee pot; two silver tea pots, one silver slop bowl, one silver sugar bowl, one silver cream vessel, one silver soup ladle, one silver sugar tongs; two silver sauce ladles, two silver butter knives, a variety of large and small silver spoons, sundry silver forks, one iron fire-proof chest; three mahogany bedsteads, three bureaus, two mahogany and two walnut tables; one large looking-glass, two dressing glasses; ten cane bottomed chairs, sundry windsor chairs, four carpets, three iron stoves, one fine wardrobe, one bookcase and desk, four pair of andirons, with as many shovels and tongs, a variety of knives and forks, tubs, kettles, crockery and other household and kitchen furniture; a debt of three thousand dollars, due from William Muldrow; a debt of five hundred dollars due from Samuel Dunnahower; a debt of five hundred dollars, due from Joseph M. Hampton; a debt of five hundred dollars, due from Samuel Carswell Ely; a debt of one thousand dollars, due from the late firm of Ely, Walton & Hendricks; a debt due from Paul Hunter; a debt of five hundred dollars, due from Robert J. Smith; a debt of five hundred dollars, due from William R. Dowling; a debt from Crigmire, Crumley & Miley of about one thousand dollars.

All that tract of land known as the northwest quarter of the northeast quarter of section No. 25, in township No. 57, north of the base

line in range No. 8, west of the 5th principal meridian, in the district of lands offered for sale at Palmyra, in Missouri; the southwest quarter of section No. 7, in township No. 58 north, in range No. 7 west, as above; the southeast quarter of the southeast quarter of section No. 26; the west half of the southeast quarter of section No. 26; the east half of the northeast quarter of section No. 27; the west half of the southwest quarter of section No. 26, and the west half of the northwest quarter of section No. 36, all in township No. 57 north, in range No. 7 west, which John Moss, Jr., conveyed to the defendant. The east half of the southwest quarter of section No. 33, in township No. 58 north, in range No. 5 west, of the 5th principal meridian; the east half of the northeast quarter of section No. 17, in township No. 58 north, in range No. 5 west; fractional section No. 22, in township No. 59 north, in range No. 5 west, as above; the southeast fractional quarter of section No. 28, in township No. 59 north, in range No. 5 west, together with the two frame houses thereon erected; the west half of section No. 28, in township No. 59 north, in range No. 5 west; the southwest quarter of section No. 3, in township No. 56 north, in range No. 6 west; the east half of the southeast quarter of section No. 4, in township No. 56 north, in range No. 6 west; the west half of the southeast quarter of section No. 4, in township No. 56 north, in range No. 6 west; the northwest quarter of section No. 3, and the northeast quarter of section No. 4, in township No. 56, and the east half of the northwest quarter of section north, in range No. 6 west; the east half of the southwest quarter, and the east half of the southeast quarter, and the southwest quarter of the southeast quarter of section No. 33, in township No. 57 north, in range No. 6 west; the west half of the northwest quarter of section No. 34, in township No. 57 north, in range No. 6 west, together with the buildings thereon erected, except 17 acres and a half sold to J. G. Easton and S. Baldwin, four hundred and forty-seven acres of land conveyed to the said defendant by Rhodes Gentry and wife, in township No. 57, in range No. 6 west, except 5 acres sold to J. C. Beaty, 5 acres to Alexander J. Dallas, and 5 acres to Benjamin Pyatt, in sections 20 and 21 in said township and range, together with all the buildings on said land, the same being subject to mortgage debt of 2886 dollars due to James Gallaher; sixty acres, more or less, conveyed by James Thomas to defendant, with two framed buildings and a blacksmith shop; the northeast quarter of the northeast quarter of section No. 29, in township No. 57 north, in range No. 6 west. Ten acres of land, being twenty rods from east to west, and 80 rods from north to south, on the west side of the northeast quarter of the southeast quarter of section No. 34, in township No. 57 north, in range No. 6 west; twelve acres and one-tenth of an acre, together with two brick houses and appurtenances, conveyed by Daniel Bradley and wife to defendant, adjoining the town of Palmyra; lots 5 and 6, in block No. 26,

in the town of Palmyra; lots 4, 5, and 6, in block No. 47, in Dickerson's addition to the town of Palmyra, together with the improvements thereon, you cause to be made the debt, damages, and costs, aforesaid, and that you have the same before the judge of our said court, on the second Monday in April next, to satisfy said debt, damages, and costs, and that you have then there this writ, certifying how you have executed the same.

Witness, John P. Rutter, clerk of our said court, and [SEAL.] the seal thereof. Done at office in Palmyra, at the county aforesaid, on this seventeenth day of October, A.D. 1843.

JOHN P. RUTTER,
Clerk.

(Upon which said execution are the following indorsements:)

*Indorsement.*

This execution came to my hands as sheriff of Ralls County, at New London, on the 2d day of November, A.D. 1843.

JOHN JAMESON,
Sheriff.
By his deputy, WM. MADDOX.

*Levy.*

I have levied this execution upon the within described lands, situate in Ralls county, this second day of November, A. D. 1843, to wit:

| | | | | |
|---|---|---|---|---|
| The S. W. | qr. | of S. 3, | T. 56, | R. 6. |
| " S. E. | " | " 4, | " 56, | " 6. |
| " W. ½ S.E. | " | " 4, | " 56, | " 6. |
| " N. W. | " | " 3, | " 56, | " 6. |
| " N. E. | " | " 4, | " 56, | " 6. |
| and the E. ½ | | " 4, | " 56, | " 6. |

Given under my hand the date above written.

JOHN JAMESON,
Sheriff, Ralls County.

*Return.*

"I return this execution unsatisfied, on this 3d day of April, 1844.

JOHN JAMESON,
Sheriff, Ralls County.

(And attached to which said execution are words and figures following, to wit:)

*Notice of Sale.*

"Sheriff's Sale."

"In virtue, and by authority of an execution issued from the office of the clerk of the Circuit Court of the County of Marion, Missouri,

and to me directed, in favor of Margaret Carswell and Samuel McClelland, against Ezra Stiles Ely, I have levied upon and seized all the right, title, and interest, and claim of the said Ezra Stiles Ely in and to the following described real estate, to wit, 160 acres of land the

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | S.W. | qr. | of section | 3, | Town. 56, | Range | 6. |
| 160 acres | S.E. | " | " | 4, | " 56, | " | 6. |
| 80 acres | W.½ S.E. | " | " | 4, | " 56, | " | 6. |
| 160 acres | N.E. | " | " | 4, | " 56, | " | 6. |
| and the | E.½ N.W. | " | " | 4, | " 56, | " | 6. |

situate in Ralls County, Missouri, together with the buildings and improvements thereunto belonging, and will sell the same (subject to all prior liens and judgments), to the highest bidder for ready money, at the court-house door, in the town of New London, in the county and State aforesaid, on Tuesday the 3d day of April next, between the hours of nine and five o'clock of that day, to satisfy said execution and costs.

"JOHN JAMESON,
Sheriff of Ralls County."

*Return of Sheriff.*

State of Missouri, County of Ralls, *ss.*

In pursuance to the foregoing levy made on the within attached execution, I advertised the following described real estate for sale, by putting up two handbills in six different public places in Ralls county, giving at least twenty days' notice of the time, place, and terms of sale; and on Wednesday the third day of April, A.D. 1844, between the hours of nine and five o'clock of that day, I offered said real estate for sale at public auction to the highest bidder for ready money at the court-house door in the town of New London, while the Ralls Circuit Court was in session, and Stanton Buckner, attorney for Virginia Mason, being the highest and best bidder, became the purchaser of the N.W. qr. of section No. 3, in township No. 56, in range No. 6, at the sum of five dollars, and the N.E. qr. of section No. 4, in township 56, in range No. 6, at the sum of five dollars, making in all the sum of ten dollars; and James H. Patterson being the highest and best bidder, became the purchaser of the S.W. qr. of section No. 3, in township No. 56, in range No. 6; the S.E. qr. of section No. 4, in township No. 56, in range No. 6; the first lot to said Patterson, for the sum of five dollars; the next at the sum of one dollar; the W. ½ of the S.E. qr. of section No. 4, in township No. 56, in range No. 6, at one dollar; and the E. ½ of the N.W. qr. sec. No. 4, in township No. 56, in range No. 6, at the sum of six dollars, making thirteen dollars, and in all the sum of twenty-three

dollars, which is applied to the payment of the costs coming to the sheriff and clerk of Ralls County.

Given under my hand on this 3d day of April, A.D. 1844.

JAMES JAMESON,
Sheriff of Ralls County.

And afterwards, to wit, on the fifteenth day of March, 1848, at a Circuit Court, continued and held at the court-house in the town of Palmyra, being during the March term, 1848, of said court, for the county of Marion, in the State of Missouri, before the Honorable Ezra Hunt, judge of said court, the following amongst other proceedings were had, to wit:

*Amendment to Sheriff's Return.*

MARGARET CARSWELL & SAMUEL MCCLELLAN, plaintiffs,
*v.*
EZRA STILES ELY.

At this day comes Jordan J. Montgomery, late sheriff of Marion County, and on motion he is allowed to amend his return upon the execution issued herein, which amendment he makes in the words and figures following, to wit:

By way of amendment to the above return, and from a written memorandum in my possession, as well as from my recollection of the facts, I hereby certify that I did levy upon, seize, and sell in manner and form as above, the following real estate, to wit: twelve acres and one-tenth of an acre, together with the appurtenances, conveyed by Daniel Bradley and wife to defendant, adjoining the town of Palmyra; when and where, to wit, on the day of sale above named, Samuel T. Glover and Carty Wells, being the highest bidders, became the purchasers thereof at the sum of twelve dollars and ten cents.

J. J. MONTGOMERY,
Late Sheriff of Marion County.

August, 1848.

State of Missouri, County of Marion, *ss.*

I, Thomas E. Thompson, clerk of the Circuit Court in and for the county of Marion aforesaid, certify that the foregoing pages contain a full, true, and complete transcript of the record and proceedings had in said court in relation to the cause therein mentioned, together with all the original papers filed in said cause, as fully and completely as the same remains of record and on file in my said office.

In testimony whereof I hereto set my hand, and affix the [L. S.] seal of said court. Done at office at Palmyra in the county aforesaid, this 26th day of July, A. D. 1850.

THO. E. THOMPSON,
Clerk.

Tho. E. Thompson, clerk.
For this transcript, certificate, and seal, . . . $12 00

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*Exhibit No.* 14.

State of Missouri, County of Marion, *ss.* In the Recorder's Office.

Release. Carswell and McClelland to Miles.

Know all men by these presents, that we, Samuel McClelland, M. D., of the city of Philadelphia and State of Pennsylvania, and Margaret Carswell of the same place, widow, under and by pursuance of a decree of the Court of Common Pleas for the city and county of Philadelphia, sitting in equity, made and entered on the thirteenth day of March, Anno Domini one thousand eight hundred and fifty, in a certain suit there pending, wherein George Sharswood and Frederick A. Raybold were complainants, and we, the said Samuel McClellan and Margaret Carswell, Ezra Stiles Ely, and Mary Bready, were defendants, of the term of December, 1842, No. 2, have released, assigned, transferred, set over, and by these presents, pursuant to said decree, do release, assign, transfer, and set over unto Thomas J. Miles, of the said city of Philadelphia, and to his heirs and assigns, all the estate, right, title, and interest vested in us, or either and each of us, by virtue of a certain mortgage deed between the said Ezra Stiles Ely, D.D., and the said Margaret Carswell and Samuel McClellan, bearing date the 5th day of January, Anno Domini one thousand eight hundred and thirty-eight, and recorded in the recorder's office of Marion County, Missouri, in Book E., at page 457, 458, 459, and 460, and of a certain deed bearing date the seventeenth day of November, Anno Domini one thousand eight hundred and forty-three, between Jordan J. Montgomery, sheriff of Marion County, Missouri, and the said Margaret Carswell and Samuel McLellan, which last-mentioned deed is recorded in the

recorder's office of Marion County, Missouri, in Book K., at pages 411, 412, and 413, in all the lands, tenements, hereditaments, and personal estate of every description, mentioned or described in the said mortgage and in the said sheriff's deed, together with all and singular the rights, privileges, hereditaments, and appurtenances mentioned or described in the said last-mentioned deeds, and together also with all the right, title, interest, and estate of, in, and to the same, vested in us, or either of us, by virtue of the aforesaid mortgage and the aforesaid sheriff's deed, and together also with all the rights, powers, and privileges vested in us by virtue of the said hereinbefore recited deeds, in and over the said lands, tenements, hereditaments, real and personal estate, therein mentioned or described; to have and to hold the said property, hereditaments, real and personal estate hereinbefore described, mentioned, and referred to, to and for the use of the said Thomas J. Miles, his heirs and assigns, in fee simple. In trust, nevertheless, to and for the use of the said George Sharswood and Frederick A. Raybold, trustees of Mary Ann Ely Miles, late Mary Ann Ely Carswell, under and by virtue of a certain deed of marriage settlement, dated the second day of October, Anno Domini one thousand eight hundred and forty-three, recorded in the recorder's office for the city and county of Philadelphia, in Deed Book R. L. L., No. 15, page 33, and also in trust for the said Mary Bready, widow, in whom, it is declared by said decree, is now vested all the interest of the heirs of Clement Lee Bready in the several and respective shares, proportions, and interests to which the said Mary Ann Ely Miles (late Carswell) and the said Mary Bready are or may be entitled, under and by virtue of the trusts declared in the said mortgage deed, dated the 5th day of January, Anno Domini one thousand eight hundred and thirty-eight, between the said Ezra Stiles Ely, D.D., and the said Margaret Carswell and Samuel McLellan, and which is the mortgage deed hereinbefore particularly recited and referred to.

In witness whereof, we, the said Margaret Carswell and Samuel McLellan, have hereunto set our hands and seals this twenty-seventh day of March, in the year of our Lord one thousand eight hundred and fifty (1850).

MARGARET CARSWELL. [SEAL.]
SAMUEL McLELLAN. [SEAL.]

Sealed and delivered in the presence of us.
J. J. ROBINSON.
MARGARET LAMB.
As to the signature of Margaret Carswell.

Sealed and delivered by Samuel McLellan, in the presence of us.
GEORGE CONNELL.
JOHN H. FRICK.

State of Pennsylvania, City and County of Philadelphia, *ss.*

Be it remembered, that on this 27th day of March, in the year of our Lord one thousand eight hundred and fifty (1850), before me, John H. Frick, a commissioner for the State of Missouri, resident in the State of Pennsylvania, to take acknowledgments of deeds, &c., personally came Margaret Carswell, personally known to me to be the person whose name is subscribed to the foregoing instrument of writing, as having executed the same, and acknowledged the same to be her act and deed for the purposes therein mentioned.

[SEAL.] Witness my hand and seal, as such commissioner, the day and year first above written.

JOHN H. FRICK,
Commissioner of Deeds, &c.

State of Pennsylvania, City and County of Philadelphia.

Be it remembered, that on this second day of April, in the year of our Lord one thousand eight hundred and fifty (1850), before me, John H. Frick, a commissioner for the State of Missouri, resident in the State of Pennsylvania, to take acknowledgments of deeds, &c., personally came Samuel McLellan, personally known to me to be the person whose name is subscribed to the foregoing instrument of writing, as having executed the same and acknowledged the same to be his act and deed for the purposes therein mentioned.

[SEAL.] Witness my hand and official seal, as such commissioner, the day and year first above written.

JOHN H. FRICK,
Commissioner of Deeds, &c.

Filed for record in the Recorder's Office of Marion County, on the 17th day of June, A.D. 1850.

THOMAS E. THOMPSON,
Recorder.

State of Missouri, County of Marion, *ss.*

I, Thomas E. Thompson, recorder within and for the county of Marion and State aforesaid, certify the foregoing to be a true and complete transcript of an instrument of writing as found of record in my said office, as fully as the same now appears in Deed Book 2, at pages 164 and 165.

[L. S.] In testimony whereof I hereto set my hand and affix my official seal, at office in Palmyra, in the county aforesaid, this 7th of July, A. D. 1856.

THOS. E. THOMPSON,
Recorder.

The following are the exhibits referred to in the answer of defendant, Thomas J. Miles:

*Exhibit A.*

Pennsylvania, City and County of Philadelphia, *ss.*

I, Oswald Thompson, president of the first judicial district of Pennsylvania, and presiding judge of the Court of Common Pleas, Orphans' Court, and Court of General Quarter Sessions of the Peace for the City and County of Philadelphia, do certify that Charles H. Carrigan, by whom the annexed record, certificate, and attestation were made and given, and who in his own proper handwriting has thereunto subscribed his name and affixed his official seal, was, at the time of so doing, and now is, register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia, in the commonwealth of Pennsylvania, duly commissioned and qualified, to all whose acts as such, full faith and credit are and ought to be given, as well in courts of judicature as this court, and that the said record, certificate, and attestation, are in due form and made by the proper officer.

In testimony whereof I have hereunto set my hand the twenty-fifth day of January, eighteen hundred and fifty-six.

OSWALD THOMPSON.

City and County of Philadelphia, *ss.*

I, James G. Gibson, Esquire, prothonotary of the Court of Common Pleas for the City and County of Philadelphia, *do certify* that the Honorable Oswald Thompson, Esq., by whom the foregoing attestation was made, and whose name is thereto subscribed, was, at the time of making thereof, and still is, president of the first judicial district of Pennsylvania, and president of the Court of Common Pleas, Orphans' Court, and Court of General Quarter Sessions of the Peace for the City and County of Philadelphia, duly commissioned and sworn, to all whose acts as such, full faith and credit ought to be given, as well in courts of justice as elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court the twenty-fifth day of [L. S.] January, eighteen hundred and fifty-six.

JAS. G. GIBSON,
Prothonotary.

*Will of Samuel Carswell.*

Be it remembered, that I, Samuel Carswell, of the city of Philadelphia, merchant, being of sound mind and memory—praised be the Lord for the same—have thought proper to make, and hereby do make, my last will and testament, in manner following, that is to

say: First, I will that all my just debts and funeral expenses be duly paid and satisfied.

Item. I give and bequeath to my beloved wife, Margaret Carswell, all my household goods and kitchen furniture of every description (except my plate), also my carriage and two carriage horses; also all the stock now standing in her name, and a present legacy or sum of two thousand dollars, to hold to her absolutely and forever; moreover, I give and bequeath to her, my said wife, my house and lot, situate on Spruce street between Delaware and Fifth and Sixth streets, in the said city, and one-third part of the net income of all my other real estate situate in the city and county of Philadelphia, to hold to her for and during all the term of her natural life, in lieu and bar of dower; she, however, to pay the taxes and ground-rent on the house in Spruce street, and keeping the same in tenantable repair.

Item. I give and devise to my daughter, Mary Ann Carswell, now Mary Ann Ely, all my real estate situate in the Northern Liberties in the county of Philadelphia, to hold to her for and during all the term of her natural life; and from and immediately after her decease, I give and devise the same premises to all her children born and to be born, and the lawful issue of them as may then be deceased, in equal parts and shares in fee, so nevertheless that such lawful issue take and receive such part and share only as his, her, or their deceased parent would have had and taken if living.

And I will and bequeath to my executors, hereinafter named, the sum of fifteen thousand dollars, to be by them laid out in the purchase of a house and lot in the city of Philadelphia, for the use of my said daughter Mary Ann Ely, to be conveyed to her during her life, and after her decease to all her children born and to be born, their heirs and assigns, forever, as tenants in common, and not as joint tenants; and if the house and lot should not cost that sum, then the residue of said sum to be paid to her my said daughter.

Item. I give to my executors, hereinafter named, and the survivors and survivor of them, three hundred shares of my stock in the Bank of the United States, in trust, to receive the dividends thereof, and pay one thousand dollars per annum of the said dividends (in half-yearly payments, if the said stock shall yield that sum per annum) to my son, Samuel Kinsey Carswell, for and during all the term of his natural life, or so long as he shall remain single and unmarried, and the residue of the said dividends beyond the said sum of one thousand dollars, to be by said executors placed out at interest for his benefit. But if my said son shall marry, then the whole of the dividends shall be paid to him during his life; and at his decease, I will and direct that the said three hundred shares of stock and the increase thereof, if any, be equally divided and transferred to all his child and children born unto him in lawful wedlock then living, and the lawful issues of such of them as shall then be de-

ceased; so nevertheless that such lawful issue take and receive such part and share only as his, her, or their deceased parent would have had and taken if living, with power to my said executors to sell the said stock or part thereof, and invest the same in other productive funds if it shall be deemed more beneficial, always holding such new investment in the same trust and for the uses aforesaid. And if my said son Samuel shall die without lawful issue, then the said stock, or the property in which the same shall be invested, and the increase thereof, if any, shall sink into the residue of my estate.

Item. I give and devise to my son, Matthew William Carswell, all that my messuage, No. 24 South Front street, where I now dwell, and the lot of ground thereto belonging, and also the adjoining house and stores, No. 22, and lot of ground thereto belonging, to hold to him for and during all the term of his natural life; and from and immediately after his decease, I give and devise that same messuage house and stores and lots of ground with the appurtenances, to all his child and children that may be born unto him in lawful wedlock, and the lawful issue of such of them as may be then deceased, in equal parts and shares in fee, so nevertheless that such lawful issue take and receive such part and share only as his, her, or their deceased parent would have had and taken if living. I also give to my said son, Matthew William Carswell, three hundred and twenty-five shares of my stock in the Bank of the United States.

Item. Give and devise to my daughter, Margaret Carswell, all that my messuage, No. 261 South Front street, and the lot of ground and buildings thereto belonging, lately in the occupation of Blakey and Mills; and also the messuage, buildings, and lot of ground lately purchased by me of Mr. Pepper, situate in Black Horse alley, in the said city, together with the respective appurtenances, to hold to her for and during all the term of her natural life, and from and immediately after her decease I give and devise the same messuages, buildings, and lots or pieces of ground with the appurtenances, unto all her child and children living at her decease, and the lawful issue of such of them as shall then be deceased, in equal parts and shares in fee, so nevertheless that such lawful issue take and receive such part and share only as his, her, or their deceased parent would have had and taken if living. I also give to my said daughter, Margaretta Carswell, two hundred and fifty shares of my stock in the Bank of the United States.

Item. I give and bequeath to my brother, Alexander Carswell, in the townlands of Maganahly, in the county of Armagh, in the north of Ireland, within two miles of Newry, the sum of ten thousand dollars, to be by him equally divided between himself and his children.

Item. I give and bequeath to my brother, Robert Carswell, in the townland of Maganahly, in the county of Armagh aforesaid, the sum of ten thousand dollars, to be by him equally divided between himself

and his children. And to my nephew Samuel, son of my said brother Robert, I give the sum of four thousand dollars.

Item. I give and bequeath to my sister, Mary Carswell, now Mary White, widow, in the townland of Magnahly, in the county of Armagh aforesaid, the sum of ten thousand dollars, to be by her equally divided between herself and her children.

Item. I give and bequeath to my grandson, Samuel Carswell Ely, the sum of five thousand dollars, and in case of his decease before he shall attain the age of 21 years, then I give the same to his brothers and sisters born and to be born, in equal parts and shares. And it is my mind and will that in the meantime his mother is to receive the interest thereof.

Item. Whatever I have heretofore given to my said daughter, Mary Ann Ely, is not to be charged against her, the same having been considered by me in making this my will. And I do hereby declare that the devises of my real estate hereinbefore mentioned (except the house to be purchased for my said daughter, Mary Ann Ely), are all subject to the payment of one-third part of the nett rents to my said wife, as mentioned in the first item of this my will.

Item. I give and bequeath to my said wife and two daughters all my plate, to be equally divided among them.

Item. All the rest, residue, reversion or remainder of my estate, real and personal, whatsoever and wheresoever (including the house and lot given to my said wife during life, after her decease), I give, devise and bequeath to my three children, Mary Ann Ely, Matthew William Carswell, and Margaretta Carswell, their respective heirs, executors, administrators, and assigns, in equal parts and shares, as tenants in common. And the better to effect a division of my residuary estate, I authorize and empower my executors to sell and dispose of such of my real estate as is not hereinbefore specifically devised, and to grant and convey the same to the purchaser or purchasers thereof in fee.

Item. It is my will that if any or either of my said brothers or sisters shall happen to die before me, then and in that case, the legacy herein given to such decedent shall not lapse, but the said legacy given to such decedent shall go, and I give the same to the children of such decedent, in equal parts and shares. And if any or either of my younger children shall die under age without issue, then and in such case, but not otherwise, I give the part and share intended for such decedent and his or her children and issue to the survivors and survivor of my said three children, to wit, Mary Ann, Matthew William, and Margaretta, and the lawful issue of such of them as shall then be deceased, their respective heirs, executors, and administrators forever, in equal parts and shares as tenants in common, so nevertheless that such lawful issue take and receive such part and share only as his, her or their deceased parent would have taken, if living.

Item. I nominate and appoint my son-in-law, the Reverend Ezra Stiles Ely, and my friends, General John Steele and William Davidson, executors of this my last will and testament, hereby revoking all former wills by me heretofore made, and declare this only to be my last will and testament.

In witness hereof, I have hereunto set my hand and seal, this d day of September, in the year of our Lord one thousand eight hundred and twenty-one.

SAMUEL CARSWELL. [SEAL.]

Signed, sealed, published and declared by the testator, Samuel Carswell, for and as his last will and testament, in the presence of us, the word "lately" first interlined.

THOMAS KELLY,
ISAAC WAMPOLE.

*Copy of Attestation.*

Philadelphia, March 12, 1822, then personally appeared Thomas Kelly and Isaac Wampole, the witnesses to the foregoing will, and on their solemn oaths, according to law, did depose and say, that they did see and hear Samuel Carswell, the testator in the said will named, sign, seal, publish and declare the same as and for his last will and testament, and that at the doing thereof he was of sound mind, memory and understanding, to the best of their knowledge and belief.

Coram.

EDMUND ROGERS,
Deputy Register.

*Letters Testamentary granted to Ely.*

The Reverend Ezra Stiles Ely, one of the executors sworn the same day, and letters testamentary granted unto him.

City and County of Philadelphia, *ss.*

Register's office, January 26th, 1856, I do certify the foregoing writing to be a true copy of the original last will and testament of Samuel Carswell, deceased, together with the probate thereof, as the same remains of record in this office. [L. S.]

Witness my hand and seal of office, the date above written.

CHARLES W. CANIGAN,
Register.

*Exhibit B.*

Will of Samuel K. Carswell.

Know all men by these presents, that I, Samuel K. Carswell, of the city of Philadelphia, do make this my last will and testament,

that is to say, I give all my estate after my debts are paid and funeral charges, to my wife Elizabeth, and I appoint the Rev'd Ezra Stiles Ely, D.D., of Philadelphia, executor of this my last will, and I request that my wife Elizabeth may be the guardian of our infant daughter's person so long as my wife shall remain my widow, while I nominate and appoint the said Ely to be the guardian of the property of my said daughter Mary Ann, and if my wife shall decease or marry again after my decease, then I wish the said Ely to be guardian both of the person and property of my said daughter.

Done at Holmesburgh, Pa., this fourteenth day of June, A.D. 1829.

SAM'L K. CARSWELL.

Witnesses present,
JOHN ROBINSON,
MARGARET CARSWELL.

Philadelphia, July 16th, 1829. Then personally appeared John Robinson and Margaret Carswell, the subscribing witnesses to the foregoing will, and on their solemn oaths, according to law, did depose and say, that they were present and did see and hear Samuel K. Carswell, the testator in the foregoing will named, sign, publish and declare the same as and for his last will and testament, and that at the doing thereof he was of sound mind, memory and understanding, to the best of their knowledge and belief.

Coram.

JOHN B. SEWALL,
Deputy Register.

Ely, Executor, sworn.

Same day, Ezra Stiles Ely, executor, sworn, and that he would diligently and faithfully regard, and well and truly comply with the provisions of the law relating to collateral inheritance.

City and County of Philadelphia, *ss.*

I certify the foregoing writing to be a true copy of the original last will and testament of Samuel K. Carswell, deceased, as well as the probate thereof, as filed and recorded in the Register's office for the city and county of Philadelphia.

Witness my hand and seal of office, this 11th day of January, A. D. 1844.

[L. S.]

ROBERT F. CHRISTY,
Deputy Register.

*Exhibit F.*

Sheriff's Deed to Carswell and McClelland.

This indenture, made and entered into this seventeenth day of November, in the year of our Lord 1843, between Jordan J. Montgom-

ery, sheriff of Marion County, in the State of Missouri, of the first part, and Margaret Carswell and Samuel McClellan, of the second part, witnesseth, that whereas Margaret Carswell and Samuel McClellan, plaintiffs, on the 23d day of August, A. D. 1845, at the Circuit Court for Marion County, in the State of Missouri, hath recovered against Ezra S. Ely, for debt, the sum of dollars and cents, and the sum of 34,000 dollars and cents, which to the plaintiffs were adjudged for their damages by reason of the detention of the said debt, and also the sum of eight dollars and five cents costs, for which said debt, damages and costs a writ of execution was issued on the 16th day of October, 1843, from the office of the clerk of the Circuit Court of the said County of Marion, signed by John P. Rutter, clerk thereof, and to the sheriff of Marion County directed, commanding him that of the goods and chattels and real estate of the aforesaid Ezra S. Ely, he cause to be made the debt, damages and costs aforesaid, and that he have the same before the judge of the said court on the first Monday in November, A.D. 1843, to satisfy said debt, damages and costs, and that he certify to said judge, how he executed said writ, and that he have then there this writ.

And by authority of said writ of execution, the said Jordan J. Montgomery, sheriff of Marion county aforesaid, levied upon and seized all the right, title, interest and claim of the said Ezra S. Ely in and to the following described real estate, to wit: lots No. 5 and 6, in block 26, in the town of Palmyra, and lots No. 4, 5, and 6, in block No. 47, in Dickerson's addition to the town of Palmyra, in the county of Marion; 48 acres of the west half of section 34, township 57, range 6 west, being defendant's in trust, after deducting 17 acres sold to J. G. Easton and S. , and 15 acres sold under the above-named execution to Arthur Roach; northwest quarter of the northeast quarter of section 25, township 57, range 8 west; the southeast quarter of the southeast quarter of section 26, township 57, range 7 west; the west half of the southeast quarter of section 26, township 57, range 7 west; the east half of the northeast quarter of section 27, township 57, range 7 west; the west half of the southwest quarter of section 26, township 57, range 7 west; the west half of the northwest quarter of section 36, township 57, range 7 west; the east half of the southwest quarter of section 33, township 58, range 5 west; the east half of the northeast quarter of section 17, township 58, range 5 west; fractional section 22, township 59, range 5 west; the east half of the southwest quarter of section 33, township 57, range 6 west; the east half of the southeast quarter of section 33, township 57, range 6 west; the southwest quarter of the southeast quarter of section 33, township 57, range 6 west; the north half of section 33, township 57, range 6 west, except 5 acres, being a strip of land 10 rods wide, extending across the south side of the west half of the north-

west quarter of said section; 60 acres of land, sold by James Thomas to E. S. Ely, being part of the west half of the southeast quarter of section 21, township 57, range 6 west, and by Wm. R. Dowling to Mary Ann Mills Ely, and by William Delzell to Benjamin Ezra Stiles Ely, in the northeast quarter of the southeast quarter of section 21, township 57, range 6 west; the northeast quarter of the northeast quarter of section 29, township 57, range 6 west; 10 acres of land, being a lot 20 rods wide from east to west, and 80 rods deep from north to south, on the west side of the northeast quarter of the southeast quarter of section 34, township 57, range 6 west; 447 acres of land, sold by Rhodes Gentry and wife, to E. S. Ely, in township 57, range 6 west, except 15 acres sold to J. C. Beaty, A. J. Dallas, and Benjamin Pyatt, subject to a mortgage to James Gallaher, together with the buildings and improvements thereunto belonging, and did expose the same to sale, subject to all prior liens and judgments, publicly by auction, for ready money, at the door of the court-house, within and for the said county of Marion, on the 17th day of November, A.D. 1843, between the hours of nine in the forenoon and five in the afternoon of that day, during the term of the Circuit Court of said county of Marion (having previously given 20 days' notice of the time and place of sale, and what real estate was to be sold, and where situated, by at least six handbills, signed by said Jordan J. Montgomery, sheriff of said county of Marion, and put up in public places in different parts of said county of Marion). And the aforesaid party of the second part, who was the highest bidder, at the sum of ten dollars and seventy-five cents, became the purchaser thereof; therefore, for and in consideration of the sum of ten dollars and seventy-five cents, to the aforesaid Jordan J. Montgomery, sheriff, in hand paid by the aforesaid Margaret Carswell and Samuel McLellan, the receipt whereof is hereby acknowledged, the said party of the first part has bargained and sold, and by these presents does sell and convey unto the said Margaret Carswell and Samuel McLellan, all the right, title, interest and claim which the aforesaid defendant, Ezra Stiles Ely, had in and to the above-described real estate, subject to the aforesaid execution, so far as he, the said Jordan J. Montgomery, sheriff of Marion county, can do, to have and to hold the above granted premises to the said Carswell and McClellan, and their heirs and assigns, forever, against the claim or claims of him, the said Ezra S. Ely, and all others claiming under him by title acquired since the liens of the aforesaid judgment, but against the claim or claims of no other person or persons whatsoever.

In testimony whereof, I, Jordan J. Montgomery, sheriff of Marion county, have hereunto set my hand and seal, on the day and year first above written.

J. J. MONTGOMERY, [L. S.]
Sheriff of Marion County.

State of Missouri, County of Marion, *ss.*

In the Circuit Court, April Term, A.D. 1844.

Be it remembered, that on this 26th day of April, in the year of our Lord 1844, before the Hon. P. H. McBride, judge of the Circuit Court within and for the county aforesaid, came into open court, Jordan J. Montgomery, personally known to the said judge to be not only the person whose name is subscribed to the foregoing instrument of writing as having executed the same, but as the sheriff of the county of Marion also, and then and there in open court before the said judge, acknowledged the said instrument to be his act and deed, for the purposes therein mentioned, a certificate of which acknowledgment is ordered to be, by the clerk of said court, indorsed on the back of this deed.

In testimony of which, I, John P. Rutter, clerk of our said [L. S.] court, have hereunto set my hand and affixed the seal of our said court; done at office, at Palmyra, in the county aforesaid.

JOHN P. RUTTER,
Clerk.

State of Missouri, County of Marion, *ss.*

In the Recorder's office.

I, John P. Rutter, recorder in and for said county of Marion, do hereby certify that the within and foregoing instrument of writing was received by me for record February 17, 1845, and that the same has been duly recorded in my said office, in book K., for recording such conveyances, and at pages 411, 412, and 413.

Given under my hand and official seal; done at office at Pal- [L. S.] myra, this 5th day of March, 1845.

JOHN P. RUTTER,
Recorder.

*Release. McClellan & Carswell to Miles.*

Know all men by these presents, that we, Samuel McClellan, M.D., of the city of Philadelphia and State of Pennsylvania, and Margaret Carswell of the same place, widow, under and by pursuance of a decree of the Court of Common Pleas for the City and County of Philadelphia, sitting in equity, made and entered on the 13th day of March, A.D. one thousand eight hundred and fifty, in a certain suit there pending, wherein George Sharswood and Frederick A. Raybold were complainants, and we, the said Samuel McClellan and Margaret Carswell, Ezra Stiles Ely, and Mary Bready were defendants, of the term of December, 1848, No. 2, have released, assigned, transferred, set over, and by these presents,

pursuant to said decree, do release, assign, transfer and set over unto Thomas J. Miles of the said city of Philadelphia, and to his heirs and assigns, all the estate, right, title, and interest vested in us, or either and each of us, by virtue of a certain mortgage deed between the said Ezra Stiles Ely, D.D., and the said Margaret Carswell, and Samuel McClellan, bearing date the fifth day of January, Anno Domini one thousand eight hundred and thirty-eight, and recorded in the recorder's office of Marion county, Missouri, in book E., at pages 457, 458, 459, and 460, and of a certain deed bearing date the 17th day of November, Anno Domini one thousand eight hundred and forty-three, between Jordan J. Montgomery, sheriff of Marion county, Missouri, and the said Margaret Carswell and Samuel McClellan, which last-mentioned deed is recorded in the recorder's office of Marion county, in book K., at pages 411, 412, and 413, in all the lands, tenements, hereditaments, and personal estate of every description mentioned or described in the said mortgage and in the said sheriff's deed, together with all and singular the rights, privileges, hereditaments and appurtenances mentioned or described in the said last-mentioned deed; and together, also, with all the right, title, interest and estate, of, in, and to the same, vested in us, or either of us, by virtue of the aforesaid sheriff's deed.

And together, also, with all the rights, powers, and privileges vested in us by virtue of the said hereinbefore recited deeds, in and over the said lands, tenements, hereditaments, real and personal estate therein mentioned or described, to have and to hold the said property, hereditaments, real and personal estate hereinbefore described, mentioned, and referred to, and for the use of the said Thomas J. Miles, his heirs and assigns, in fee simple; in trust, nevertheless, to and for the use of the said George Sharswood and Frederick A. Raybold, trustees of Mary Ann Ely Miles, late Mary Ann Ely Carswell, under and by virtue of a certain deed of marriage settlement, dated the second day of October, Anno Domini one thousand eight hundred and forty-three, recorded in the recorder's office for the city and county of Philadelphia, in deed book R. L. L. No. 15, page 33, and also in trust for the said Mary Bready, widow, in whom, it is declared by said decree, is now vested all the interests of the heirs of Clement Lee Bready, in the several and respective shares, proportions, and interests to which the said Mary Ann Ely Miles (late Carswell) and the said Mary Bready are or may be entitled under and by virtue of the trusts declared in the said mortgage deed, dated the fifth day of January, Anno Domini one thousand eight hundred and thirty-eight, between the said Ezra Stiles Ely, D.D., and the said Margaret Carswell and Samuel McClelland, and which is the mortgage deed hereinbefore particularly recited and referred to. In witness whereof, we, the said Margaret Carswell and Samuel McClelland, have hereunto set our hands and seals this twenty-seventh day

of March, in the year of our Lord one thousand eight hundred and fifty (1850).

MARGARET CARSWELL. [L. S.]
SAMUEL McCLELLAN. [L. S.]

Sealed and delivered in the presence of us,
J. J. ROBINSON,
MARGARETTA LAMB,
As to the signature of Margaret Carswell.

Sealed and delivered by Samuel McClellan in the presence of us,
GEORGE CONWELL,
JOHN H. FRICK.

State of Pennsylvania, City and County of Philadelphia, *ss.*

Be it remembered, that on this 27th day of March, in the year of our Lord one thousand eight hundred and fifty (1850), before me, John H. Frick, a commissioner for the State of Missouri, resident in the State of Pennsylvania, to take acknowledgments of deeds, &c., personally came Margaret Carswell, personally known to me to be the person whose name is subscribed to the foregoing instrument of writing, as having executed the same and acknowledged the same to be her act and deed for the purposes therein mentioned.

Witness my hand and seal as such commissioner the day and year first above written.

JOHN H. FRICK, [L. S.]
Commissioner of Deeds, &c.

State of Pennsylvania, City and County of Philadelphia, *ss.*

Be it remembered, that on this second day of April, in the year of our Lord one thousand eight hundred and fifty (1850), before me, John H. Frick, a commissioner for the State of Missouri, resident in the State of Pennsylvania, to take acknowledgments of deeds, &c., personally came Samuel McClelland, personally known to me to be the person whose name is subscribed to the foregoing instrument of writing as having executed the same, and acknowledged the same to be his act and deed for the purposes therein mentioned.

Witness my hand and official seal as such commissioner the day and year first above written.

JOHN H. FRICK, [L. S.]
Commissioner of Deeds, &c.

State of Missouri, County of Marion, *ss.*

In the Recorder's Office.

I, Thomas E. Thompson, recorder within and for the county of Marion, do hereby certify that the foregoing instrument of writing, together with the certificates thereon, was received by me for record on the 17th day of June, A.D. 1850, and that they are duly recorded in my said office in book 2, for recording conveyances, &c., at pages 164 and 165. Given under my hand and official seal. Done at office in Palmyra, in the county aforesaid, on the 18th day of June, A.D. 1850.

THOMAS E. THOMPSON,
Recorder.

*Deposition of John Nichols.*

John Nichols, a witness of lawful age, produced, sworn, and being first carefully examined, cautioned, and sworn to tell the whole truth touching the matter in controversy between the parties herein, deposeth and saith:

I reside in the county of Marion, State of Missouri, at a distance greater than one hundred miles from the city of St. Louis.

Question by complainant. Are you acquainted with the land in controversy?

Answer. I am, and have been since 1832. I do not recollect the numbers of the land. It is a portion of what is known as the Rhodes Gentry farm, which contains about, as well as I can recollect, four hundred and forty acres.

Question. What is the quality of the tract known as the Rhodes Gentry farm?

It is thin land; a large portion poor.

Question. What was that land worth, according to the cash market value of such lands in that vicinity, in 1846, in November?

It was at that time worth from one dollar and seventy-five cents to two dollars and fifty cents per acre.

Question. Were you acquainted with the market value of lands in the vicinity of this tract in November, 1846?

Answer. I think I was. I lived in the neighborhood since 1831. I was not a speculator in lands.

Cross-examined.

Question by defendant's counsel. Had the price of lands in this county advanced or decreased from 1846 to 1850?

Answer. I think there was an advance during that period. I cannot say whether there was any material advance; I cannot fix upon any per cent.

Question by defendant's attorney. Was there any of the Rhodes Gentry farm in cultivation in 1846?

Answer. There was between seventy and one hundred acres in cultivation, inclosed with a temporary fence. There were some log cabins on it; my impression is that they were round log cabins with wooden chimneys.

And further this deponent saith not.

JOHN NICHOLS.

*Deposition of William H. Feaster.*

William H. Feaster, a witness of lawful age, produced, and being first carefully examined, cautioned, and sworn to tell the whole truth, on the part of the complainant deposeth and saith:

I reside in the county of Marion and State of Missouri, at a greater distance from the city of St. Louis than one hundred miles. I am acquainted with the land in controversy; it lies adjoining the tract in which I now live, and have lived for the last eleven years. I was acquainted with the market value of lands in that vicinity in 1846. I purchased the land on which I live in 1845 or 1846. The land in controversy is a part of the tract known as the Rhodes Gentry tract. In 1846 it was not, I think, worth more than one dollar and a half or two dollars per acre. I judge by the price I paid for mine; that is all that I had to tell by. Part of the tract, I think more than half, is poor and hilly. South river runs through it crooked, and the bottoms are wet. I know of no sales of land in the vicinity in 1846, except the tract purchased by myself; I do not recollect of any other.

And further this deponent sayeth not.

WILLIAM H. FEASTER.

*Deposition of Cacy Forman.*

Casey Forman, a witness of lawful age, being produced on the part of the complainant, and being first carefully examined, cautioned, and sworn to tell the whole truth, deposeth and sayeth: I reside in the county of Marion and State of Missouri, at a greater distance than one hundred miles from the city of St. Louis.

Question by complainants' attorney. Were you acquainted with Dr. E. S. Ely in 1837 and 1838?

Answer. I was. I formed his acquaintance when he first moved to this State, about the year 1834 or 1835.

Question. Where was he residing in January, 1838? and what business was he engaged in at that time?

Answer. He then resided at West Ely, in Marion county, and he was engaged in farming.

Question. How far did you then reside from West Ely? and did you visit his farm?

Answer. About three miles. I was then engaged in trading, and passed his farm often.

Question. In the fall of 1837, and the winter of 1838, say in January and February, 1838, what produce or stock, if any, did you see upon the farm of Dr. Ely?

Answer. I saw at that time stock consisting of horses, cattle, and hogs. I also saw corn, hay, and oats.

Question. What number of stock and what quantity of produce did you see on the farm of the various kinds you have mentioned?

Answer. I did not count the stock. There was a large number of stock and a large quantity of produce.

Question. Were you acquainted with the market value of stock produced in that vicinity in January and February, 1838?

Answer. I was then trading in stock and produce, buying and selling, and was acquainted with the market value.

Question. Can you state the aggregate of the stock then on the farm of Dr. Ely?

Answer. If I knew the quantity and kind of stock I could.

Question. Can you state and give an estimate of the aggregate value of the stock and produce then on the farm? If so, give your estimate.

Answer. It would be guesswork. I saw a large quantity of stock and produce, I suppose between three and four thousand dollars worth, on the farm.

Question. Do you know the land in controversy, and were you acquainted with its value in 1846?

Answer. I know the land. I knew it in 1846. I think I was acquainted with the value of lands in that neighborhood in 1846.

Question. What was the land in controversy worth in cash in 1846 in the market?

Answer. From one dollar and a half to two dollars per acre; not exceeding two dollars.

Qustion. Do you know what improvements were made on the land by Mr. Tatlow after he purchased it? If so, state what kind of improvements, and their value. (Question objected to by defendant's attorney.)

Answer. I do not know, except that he put up a partial fence. There was not much improvement when Mr. Caldwell bought it.

Question. What improvements has Mr. Caldwell made on the premises since he purchased? If you know, state the quantity, kind, and value. (Question objected to by defendant's attorney.)

Answer. He has made some fencing, several hundred panels. I counted the number, but do not now recollect; there were four strings, 42 double panels each, and another string of a half mile in length; he also cleared some six or seven acres of land; he has also

put in about 20 acres of meadow; there has also been two ponds made. It is in a higher state of cultivation now than it was when he got it.

Question. What is the aggregate value of the improvements made by Mr. Caldwell? (Question objected to by defendant's attorney.)

Answer. I suppose five or six hundred dollars.

Cross-examination by Defendant's Attorney.

Question. What circumstance induces you to think that the time you saw the stock and produce on the farm of Dr. Ely was in February and January, 1838?

Answer. I was then trading in stock and produce myself, buying and selling.

Question. How long had you been engaged in buying and selling stock before and after that time?

Answer. From 1826 to 1846—for several years.

Question. In what kind of stock were you trading?

Answer. I traded in horses, jacks, jennies, mules, cattle, hogs, and sheep.

Question. To what market were you trading?

Answer. I traded at home some, and to Galena, Natchez, and New Orleans.

Question. Was it in January or February, 1838, that you saw the stock?

Answer. I think I saw them in both months. I cannot state the number of horses, cattle, or hogs; there was a large number of each; nor can I state the quantity of corn, hay, or oats; the produce I saw on the farm, I presume, was grown on it. I do not know of Dr. Ely's trading in stock.

And further this deponent sayeth not.

CACY FORMAN.

*Deposition of David G. Davenport.*

David G. Davenport, a witness of lawful age, produced on the part of complainant, and having been first carefully examined, cautioned, and sworn to tell the whole truth, deposes and says: I reside in the county of Marion and State of Missouri, at a greater distance than one hundred miles from the city of Saint Louis, in said State. I am acquainted with the land in controversy. I live between ¼ and a ½ mile from it. I have been living in the vicinity for the last 19 or 20 years, with the exception of about two years I lived in California.

Question. Do you know what improvements were made in the land of Mr. Tatlow after he bought it? If so, state what kind, and the quantity of improvements made by him, and their value. (Question objected to by defendant's attorney.)

Answer. Mr. Tatlow repaired the fencing and put up a log house for a shop or stable. I think he also made one pond on it. As to the value of the improvements, it would only be guesswork with me. The house, I suppose, would be worth $50 to build it. I suppose the repairing the fences would be worth fifty dollars more.

Question. Are you acquainted with the improvements made on the premises in dispute by Mr. Caldwell, and with the value of such improvements? If so, state what improvements were made, and their value. (Question objected to by defendant's attorney.)

Answer. I am acquainted with the improvements made by Mr. Caldwell, and, I suppose, with their value. Mr. Caldwell has reset fencing, putting six new rails to the panel; he has built two strings of new fence, 125 panel in each string; these two strings were part new rails and part old, about ½ of each; he has put up one-half of the south string, which is ½ a mile long; Moses Gentry put up the other half, it being a partition fence between them. Mr. Caldwell has also made two ponds in the premises; he has also put between 16 and 20 acres in meadow, and put some manure on the balance; he has also cleared between 5 and 7 acres, and put it in cultivation. My estimate of the aggregate value of all the improvements made by Mr. Caldwell, is between five and six hundred dollars.

And further this deponent sayeth not.

D. G. DAVENPORT.

*Deposition of Allen Gallaher.*

Allen Gallaher, a witness of lawful age, produced on the part of complainant, and having been first carefully examined, cautioned, and sworn to tell the whole truth, deposes and says: I reside in the county of Ralls, at a greater distance than one hundred miles from the city of Saint Louis, in the State of Missouri, estimating the distance by the nearest travelled route. I became acquainted with Dr. E. S. Ely when he first came to this State, in the year 1835. I was intimately acquainted with him in the years 1837 and 1838, and at that time I lived in the neighborhood of West Ely, about 1¼ miles from the residence of Dr. Ely. I became acquainted with Mrs. Margaret Carswell in 1836 or 1837.

Question. What do you know, if anything, about the making of the deed of trust from Dr. Ely to Mrs. Carswell and Dr. McClellan, dated November 22d, 1837? (Question objected to by defendant's attorney.)

Answer. I don't know anything about the making of it. I heard Dr. Ely speak of it after it was made.

Question. Do you know anything about the making of the deed from Dr. Ely to Mrs. Carswell and Dr. McClellan, of Jan. 5th, 1838? (Question objected to by defendant's attorney.)

Answer. On or about the 6th day of Jan., 1838, Dr. Ely came to

my house early in the morning. I was then an acting justice of the peace. He told me that he wished me to do some writing for him, and requested me to go to his house. I went; and after I arrived at his house, he produced a bundle of papers, quite a number of them, some purporting to be deeds of conveyance to divers persons whose names I do not recollect. One of those papers Dr. Ely said was designed to be a mortgage to Mrs. Carswell and Dr. Mr. Clellan; but on that paper there was nothing written except an acknowledgment, or certificate of acknowledgment; and above the certificate his name and his wife's name, and a date on the left-hand side of the sheet, opposite to their signatures. He said he wanted me to take his and his wife's acknowledgment, and sign the certificate, stating that he intended to fill it up with a mortgage to Mrs. Carswell and Dr. McClellan, to secure them in their liability as his securities on his guardian's bond as guardian of Mary Ann Ely Carswell; that he had made a deed for that purpose, but the lawyers had said it would not answer the purpose. I think he said Mr. Bates had said so. I that morning took the acknowledgment of Dr. Ely to twenty-seven different papers; some of them written out as deeds, and others in about the same condition as the one I have spoken of. In regard to those that were blank, he stated, with reference to each, how he intended to fill them out. Dr. Ely wrote out the certificate, and I signed them. His wife was present. I expressed some surprise at that manner of doing business, and manifested a reluctance to sign the certificates to the blanks. His wife said that they were doing this to protect themselves against Rodgers; that Rodgers had brought suit, and they were apprehensive that he would sacrifice their property. This was said in the presence and hearing of Dr. Ely; he being on one side of the table, and his wife on the other side. When she said that he raised his head and looked at me. He did not say anything, but his manner looked forbidding like.

Question. State whether, in that conversation, anything was said by Mrs. Ely about other creditors. (Objected to by defendant's attorney.)

Answer. I think there was nothing said about any creditors or creditors except Rodgers.

Question. Have you ever, since that time, seen the certificate to which you referred signed by you on the blank that Dr. Ely stated that he intended to fill with a deed to Dr. McClellan and Mrs. Carswell?

Answer. I have seen a certificate with my signature to it of that date (Jan. 6th, 1838) attached to a deed mortgaging a large amount of property to Mrs. Carswell and Dr. McClellan, to secure them as his, Ely's, sureties as guardian of Mary Ann Ely Carswell. I saw it at St. Louis, in Oct., 1856, during the sitting of the United States Court. It was read during the trial of a case of Miles, the

defendant in this suit, *v.* Caldwell, the complainant, by Mr. Glover, and was submitted to me while I was testifying in said cause.

Question. State whether the mortgage of Jan. 6th, 1838, referred to by you above, is the same to which your certificate of Jan. 6th, 1838, is appended. (Objected to by defendant's attorney.)

Answer. I say that it was; that is, that the signature to the certificate was genuine, and was dated of the same date. I feel persuaded that it was a certificate signed by me at that date, and the instrument to which the certificate was appended was a mortgage of Jan. 5th, 1838.

Question. What, if anything, do you know of the property contained the mortgage of Jan. 5th, 1838? State its character, and, as near as you can, its quantity. (Objected to by defendant's attorney.)

Answer. I know the land in the mortgage, and the slaves, and the cattle and horses, tolerably well. The other property, except the hay, I did not know much about. I know there was a great deal of corn, but cannot state the quantity. I know that he had a great many hogs, but I do not recollect the number. He had a great deal of stock of every kind except sheep.

Question. State whether you had a general knowledge of all of Dr. Ely's property at that time. (Objected to by defendant's attorney.)

Answer. I cannot say that I had. I was acquainted with the slaves named in the mortgage. I have read the mortgage frequently. I was acquainted the lands in the mortgage, and a general knowledge of the other property named in the mortgage.

Question by compt. State whether you knew of any property belonging to Dr. Ely not included in the mortgage.

Answer. I can't say that I did. There was other property included in the other deeds acknowledged on that day. I can't say that I know of any property not included in some one of the deeds acknowledged that day. In speaking of the property of Dr. Ely, I have reference to about the time of taking the acknowledgments in January, 1838. He had hay in stacks; a great number of them; more than I had ever seen at one place. My impression is that there was more than 20 stacks. I cannot state how many more.

Question. Were you acquainted with the market value of such property as is described in the mortgage deed of Jan. 1838, at that time, and in the vicinity of West Ely?

Answer. I think I was.

Question. What, in your opinion, was the value of the property contained in the mortgage of Jan. 5th, 1838, at that time? (Objected to by defendant's attorney.)

Answer. I estimate the property named in the mortgage (taking the debts named in it as good, and I thought they were at that time) at about fifty-five thousand dollars. Near one-fourth in value of the

property was, in my estimation, perishable property; that is, the corn, hay, oats, hogs, and such other property as would perish or be consumed within five years.

Question. State whether the college debt, or debt on Marion College, mentioned in the mortgage, was regarded at that time as good. (Objected to by defendant's attorney.)

Answer. I esteemed it good at that time. I had not heard it called in question at that time, that I recollect.

Question. If you know, state where this property—that is, the personal property—remained, and in whose possession it was from Jan. 5th, 1838, to the year 1839.

Answer. I lived in the neighborhood during that time. I am satisfied it remained in his, Ely's, possession during the year 1838.

Question. If you know, state what became of the corn, hay, and oats, and other perishable property referred to in said deed of Jan. 5th, 1838.

Answer. My present recollection is that Dr. Ely used and disposed of it; I mean that he fed out the grain to his stock, and used the other property just as any other farmer would.

Question. How long after the making of the deed of Jan. 5th, 1838, did the personal property therein mentioned remain in the possession of Dr. Ely?

Answer. I think the negroes all passed out of the hands of Dr. Ely before the end of the year 1841. Wm. Madrom got sixteen negroes from Ely, and the negroes mentioned in the mortgage were among them. I can't say how long the other property remained in his possession. I left the neighborhood in May, 1841, and at that time nearly all the personal property had left his possession except two negroes, and Muldrow got them shortly after, and before the end of that year.

Question. Do you know anything about Dr. Ely's renting any of the lands mentioned in the mortgage of January 5th, 1838, after that date? (Objected to by defendant's counsel.)

Answer. I know that he rented out a portion of them; he rented to me a piece about twenty or twenty-five acres, in the year 1840, for which I paid him fifty dollars. I do not recollect the numbers; it was part of an 80 acre tract. Mr. Twombly rented a portion of his land the same year; he, Twombly, lived on it that year. I do not know that he rented it. Dr. Ely said he rented it to Twombly.

Question. How long did Dr. Ely remain in the possession of the lands mentioned in the mortgage after the date of the mortgage?

Answer. I left the neighborhood in May, 1841, and I think he was then in the possession of the land. I don't recollect how long he continued in possession after that, with any certainty.

Question. What was the yearly value of the rents of the land mentioned in mortgage for the years 1838, 1839, 1840, 1841, 1842 and 1843? (Objected to by defendant's counsel.)

Answer. I do not now recollect how much of the land was in cultivation, and I cannot, therefore, give any definite answer to the question.

Question. What was the yearly value of the horses and the slaves in the mortgage for the years 1838, 1839, 1840 and 1841?

Answer. The men would have hired for eight dollars per man each, and the women about fifty dollars each per annum. I think that was the value of those hired at the times spoken of as above stated.

Question. Do you know anything of an order from Ely to James Gallaher, authorizing said Gallaher to convey to James Patterson the lands in dispute, or any part of the Rhodes Gentry farm? (Objected to by defendant's attorney.)

Answer. I can't recollect so distinctly about the order. Mr. Patterson came to my house a day or two before the time expired that Ely was allowed to redeem the land in, and tendered to me, as agent for James Gallaher, the amount, principal and interest, which he said was due to James Gallaher, according to an agreement between him and Ely. After tendering me the money, which I refused to take, he left, stating that he was going to St. Charles. I do not recollect seeing any written authority; he professed to be authorized.

Question. Do you know the lands conveyed by Rhodes Gentry and wife to E. S. Ely?

Answer. I do; I know the lands known as the Rhodes Gentry farm; it has been so known for twenty years to my knowledge; it is the tract a part of which is in controversy in this suit.

Question. Who was in the possession of that farm in 1846?

Answer. I do not know.

Question. Do you know whether said land was sold under execution in 1842? and if so, were you present at such sale? (Objected to by defendant's counsel.)

Answer. The land was sold under execution, and I was present at the sale, I think, in 1842. I cannot now recollect the date; it was after 1841.

Question. Who bought it? (Objected to by defendant's counsel.)

Answer. I bid it off for my brother, James Gallaher.

Question. Was Dr. Ely present at the sale?

Answer. I have no recollection of his being present at the sale. He was in town that day, and I believe he was standing by at the time I bid it off.

Question. What did Dr. Ely do and say with reference to the sale, either in opposition to or in favor of it? (Objected to by defendant's counsel.)

Answer. Before the sale he gave me a written power to confess judgment. I do not know where it is. I thought it was in the

clerk's office until I was told that it could not be found. At the time I confessed the judgment Dr. Ely was in town, and he did not at any time, so far as I know, object to any of the proceedings, either the judgment, execution, or sale, but seemed to be pleased with it. I do not recollect the words he used, but I recollect that he was satisfied. (The foregoing answer objected to by defendant's counsel.)

Question. State whether Dr. Ely co-operated with and advised said sale.

Answer. I don't know any farther than as I have before stated.

*Cross-examined by Defendant's Counsel.*

State whether either Mrs. Carswell or Dr. McClellan was present at the time of the conversation between yourself and Dr. Ely on the subject of the acknowledgment of deeds in January, 1838.

Answer. Neither of them were present; there was no person in the room at the time except Dr. Ely, Mrs. Ely, and myself.

Question. What was the amount of the debt to Rodgers mentioned in that conversation?

Answer. About three thousand dollars, perhaps something more.

Question. Can you state what quantity of land was included in the mortgage spoken of?

Answer. I cannot; I know there was a large quantity.

Question. Can you state what the land was worth per acre? the farming lands at the date of the mortgage?

Answer. I think they were worth on an average about five dollars per acre. I mean all the lands in the deed, except the town property and a small piece adjoining the town of Palmyra.

Question. What proportion of the lands (exclusive of the town property) were wild and uncultivated, and what proportion was in cultivation?

Answer. I cannot give a definite answer. I suppose that there was less than one-fourth in cultivation.

Question. Were any of the wild and uncultivated lands of a superior quality?

Answer. There was some timber land valuable for timber, and a large portion of prairie suitable for cultivation. Some of the prairie I should not think very desirable.

Question. In January, 1838, was not the market value of lands and other property greatly depressed?

Answer. I think that property, at that time, was falling rapidly in price, and I don't think there was much real estate selling at that time; and is probable that in the state of the money market the lands in the mortgage would not have sold for five dollars per acre at a cash sale at that date.

Question. What do you suppose they would have sold for at a

cash sale at that time, 1838, January? (Objected to by complainants' counsel, and the preceding question also objected to.)

Answer. I am not prepared to answer.

Question. What number of horses and what number of cattle were included in the mortgage, and that you saw in the prairies?

Answer. I do not remember; there were a good many.

Question. What was the fair cash value of the horses and cattle that you saw in Dr. Ely's possession in 1838, and which were included in the mortgage?

Answer. I cannot answer, except that such property was lower then than now. I think that such horses as Dr. Ely had would have likely sold for about an average of seventy dollars.

Question. What would the hay on the premises of Dr. Ely have sold for in 1838?

Answer. I do not think it would have sold for more than six dollars per ton. There was nearly, if not quite, two ton in a stack, and twenty stacks, or perhaps more.

Question. Do you know what the amount of the debts due Ely and included in the mortgage were?

Answer. There was a debt due by the College about $13,000 00; a debt due from Cragmile about $1000 00; there was a claim on William Muldrow for about $3000 00; one on Hunter, I do not recollect the amount. There were several others, but I do not recollect on whom they were.

Question. Was not Marion College largely indebted, and in failing circumstances in January, 1838? (Objected to by complainants' counsel.)

Answer. I did not, at that time, know that it was dangerously involved. I knew of the Bronson mortgage; but I thought then that it was able to pay all its debts. (Answer objected to by complainants' counsel.) I found out afterwards from the actual fact that it was not able to pay the debts it then owed. (Answer objected to by complainants' counsel.)

Question. Do you not know that the debt on the College, included in the mortgage, was lost? (Objected to by complainants' counsel.)

Answer. It was lost. The claim was for money advanced by Ely for the College, and the College refused to pay it, on the ground that it was advanced by Ely without the request of the College. (Answer objected to by complainants' counsel.)

Question. What was the pecuniary condition of Wm. Muldrow in January, 1838? (Objected to by complainants' counsel.)

Answer. Muldrow had plenty of property, but was hard run for cash, and shortly afterwards assigned all his property.

Question. Can you state whether the debt against Muldrow was ever collected or not? (Objected to by complainants' counsel.)

Answer. It turned out that Ely was in Muldrow's debt instead of Muldrow being in his debt. Muldrow had purchased a large debt

against Ely, and they were joint securities to the Bank of the United States before January, 1838; Muldrow had paid the debt to the bank, and had a recourse on Ely for his share; that is what I meant by saying that he had purchased a debt against Ely.

Question. You say in your examination in chief that you thought that Ely used and disposed of the purchased property mentioned in the mortgage: did you see him using or disposing of any of it? If so, what?

Answer. I knew Ely's hands and his teams; I think I saw them hauling hay out of the meadow; I can't say about the corn. I lived in the neighborhood, and passed by frequently. The impression on my mind is, that he used and disposed of the property, but I can't state any particulars.

Question. You spoke of Muldrow having taken 16 of the negroes at one time: in what way did he take them, and by what authority?

Answer. He got them in the compromise made of a suit then pending in court.

Question. Were you (the witness) interested in the suit or in the compromise? (Objected to by complainants' counsel.)

Answer. I had no personal interest. I was assignee of Muldrow for the benefit of his creditors.

Question. Were the negroes or their proceeds appropriated to the payment of the debts of Muldrow preferred in the assignment? (Objected to by complainants' counsel.)

Answer. I think they went to pay the debts of Muldrow, but I think it was to pay debts of his mostly that were judgments older than the assignment.

Question. Did any of it go to pay debts provided for in the assignment?

Answer. I do not recollect.

Question by complainants' counsel on re-examination. *Were* Mrs. Carswell *or* Dr. McClellan in Marion County at the time you took the acknowledgment in January, 1838?

Answer. Dr. McClellan was not. It is my impression that Mrs. Carswell was then making her home at Dr. Ely's, but I cannot state positively. I cannot state positively that I saw her at any time during the winter of 1838. I did not see her that day. I think I saw her some time in the winter.

And further this deponent sayeth not.

ALLAN G. GALLAHER.

*Deposition of William Lair.*

William Lair, a witness of lawful age, produced on the part of the complainant, and having been first carefully examined, cautioned, and sworn to tell the whole truth, deposes and says:

I reside in the County Marion, and State of Missouri, at a greater distance than one hundred miles from the city of Saint Louis in said State. I believe I know the land in controversy; I have known the Rhodes Gentry farm for thirty years past; the land in controversy is a part of that tract. I live about one mile and a half from the land, and have lived there for thirty years past. I think I know what the general value of land was in that neighborhood in 1846; I think it was at that time worth two dollars and a half per acre. I think it could not have been sold for more than that price in cash. (To all which said evidence the defendant's counsel objected at the time.) And further this deponent sayeth not.

WILLIAM LAIR.

*Deposition of James Patterson.*

The said James Patterson introduced, and being by me first carefully examined, cautioned, and sworn to tell the whole truth, deposes and says, the lives in the city of Hannibal, in the county of Marion, State of Missouri, a greater distance from St. Louis than one hundred miles, and furthermore sayeth: My acquaintance with Dr. Ely began about June 10th, 1840; I was acquainted with Mrs. Margaret Carswell and Dr. McClellan from May, 1843, to the time of their death.

Question by complainant's attorney. Have you ever seen the original of the paper now shown you, marked Exhibit A.? If so, state when and where you saw it; whether you are acquainted with the handwriting of the original and the signatures thereto, and whose signatures they were.

Answer. I saw the original, of which said exhibit is a copy, in the hands of Daniel C. Tuttle, Esquire, in the town of Palmyra, in the fall of 1843, and am acquainted with the handwriting of the original, and know the signatures of the same, having seen the parties write before; they were the signatures of Mrs. Margaret Carswell and Dr. Samuel McClelland.

Question by complainant's attorney. Please state what you know of the original, and whether the said exhibit is a true copy thereof?

Answer. I know that Dr. McClellan wrote to me that he had, in connection with Mrs. Carswell, appointed Mrs. Tuttle attorney to close up the business. I went to see Mr. Tuttle, and saw the original, of which I believe exhibit marked A. is a true copy. (Defendant's counsel objected to so much of the above answer as relates to matters contained in the letter from Dr. McClellan to the witness.)

Question by complainant. Between the years 1841 and 1844 had you any conversations with said Samuel McClellan and Mrs. M. Carswell with reference to any authority they had given Dr. Ezra

S. Ely to dispose of property theretofore mortgaged to them by him as he might see proper? If so, please state said conversations.

Answer. In the month of May, 1843, I conversed with Mrs. Carswell and Dr. Samuel McClellan on the subject of the mortgage from Dr. Ely to them; they both told me that Dr. Ely had authority from them, by power of attorney, to dispose of the property embraced in that mortgage, and that they had confidence in Dr. Ely, and they believed he would do as they desired, or what was right. (Defendant's counsel objected to the testimony of the witness relating to the alleged power of attorney—the power not being produced, nor its absence accounted for.)

Question by complainant. Was there anything said by them, or either of them, as to the application Dr. Ely might make of the property or its proceeds?

They told me that they permitted him to use the proceeds of the property sold, or the property itself, to pay his debts, as he might please.

Question by complainant. Was anything said by them, or either of them, about Dr. Ely's being authorized to release the mortgage and convey the property therein for the payment of his private debts or for any other purpose? If so, please say what.

Answer. I understood from them, or they told me, that Dr. Ely had a right to dispose of this property to pay his debts.

Question by complainant. Were you acquainted with the pecuniary condition of Dr. McClellan and Mrs. Carswell from 1837 to 1852? If so, state what, in your opinion, they were worth during that time.

Answer. I was acquainted with their pecuniary condition from 1840 to 1852, in which time I always considered them worth fifty thousand dollars.

Question by complainant. When you speak of mortgaged property, what mortgage do you refer to?

Answer. I speak of the mortgage made by Dr. Ely to Mrs. Carswell and Samuel McClellan, and foreclosed by Daniel C. Tuttle, which was the same mortgage made by the advice of Mr. Bates, of Saint Louis, to Dr. Ely.

Question. Did Dr. McClellan or Mrs. Carswell say anything to you about the deed of trust of 1837, referred to by you?

Answer. No; not that I now recollect of.

Question by complainants. Did you ever hear Dr. McClellan or Mrs. Carswell say anything concerning a deed of trust executed to them by Dr. Ely? If so, what? and when did they talk to you concerning it?

Answer. I do not now recollect that they ever did; I have been trying to think, and do not now recollect that they ever did.

Question by complainant. In what manner was the authority to Dr. Ely to sell the mortgaged property given? And if you heard

Dr. McClellan or Mrs. Carswell say anything on this subject, please state it.

Question objected to by defendant's attorney.

Answer. The authority was given by power of attorney by Mrs. Carswell and Dr. McClellan to Dr. Ely, which was so told to me by them, and I saw the power of attorney in the hands of Dr. Ely likewise.

Question by complainants. In the conversations you have referred to, did Mr. Carswell and Dr. McClellan, or either of them, say anything as to the purpose for which, or the reason with which, said mortgage was made by Ely?

Answer. I don't recollect of hearing anything from them on that subject.

The plaintiff, by his counsel, then presented to the witness a paper purporting to be the deposition of this witness, taken on the 29th day of September, 1852, in the case of Thomas J. Miles, plaintiff, *v.* Moses Gentry, in the Circuit Court of Lewis County, Missouri, for the purpose of refreshing the memory of the witness, to which the defendant, by his counsel, here objects; but the said paper is here handed to the witness, who reads it here before the officer taking these depositions.

Question by complainant. Please state what, if anything, Dr. McClelland and Mrs. Carswell said to you about the deeds, whether of trust or mortgage, made by Dr. Ely to them.

Answer. I find in my deposition, referred to above, in 1852, a statement, sworn to by me, to this effect: "I know that in 1840 Dr. Ely was largely indebted, but I do not know the amount. I heard the said McClellan and Carswell, within the dates of 1841 and '44, state that Dr. Ely had made to them two conveyances of property; the first one had been shown to Mr. Bates, and his opinion taken on it, and that afterwards Dr. Ely made the second conveyance, being the mortgage foreclosed by Tuttle as aforesaid. They stated that the first deed executed and delivered to them by Dr. Ely was, in the opinion of Mr. Bates, unusual in this country, and he had advised Dr. Ely to make them another conveyance, by way of mortgage, which he did. I have heard said McClellan and Carswell say, between the dates aforesaid, that said deed of trust and mortgage were made by Dr. Ely with a view to secure the debts therein named, and to prevent sacrifices of property under execution, and to enable Dr. Ely to appropriate, as he saw fit, portions of the property therein named for the payment of his debts generally."

I now state that I recollect of having had a conversation with Dr. McClellan to the above effect, but I don't now recollect hearing anything from Mrs. Carswell about the deed of trust. The conversations with Dr. McClellan and Mrs. Carswell were in 1843. (The defendant, by his counsel, objected to the answer to the last question, because it is not responsive to the interrogatories, and because it

details for his evidence now what he had stated on a former occasion, and because he does not pretend to say the statements copied are true of his knowledge or recollection.)

Question by complainants. Do you know of the sale of any of the property included in the mortgage made by Ezra Stiles Ely to Dr. McClellan and Mrs. Carswell, above referred to, by said Ely, after the date of said mortgage; if so, to whom was such sale or sales made, and how you know of such sale or sales?

Answer. I have a bill of sale marked Exhibit B., hereto attached, including much of the personal property embraced by the mortgage before referred to by me as being foreclosed by David C. Tuttle; said bill of sale was made to me by Dr. Ely, and signed by him for himself, and as attorney for Mrs. Carswell and Dr. McClellan. It was made on the day of its date, the 1st of February, 1842, with the consent of Dr. McClelland. I think about three thousand dollars worth of the property, included in the bill of sale, was embraced in the mortgage above referred to. I know the signature of Dr. Ely to the bill of sale is genuine; I saw him write it. I know also that Dr. Ely sold to Abram Barnes personal property and real estate, embraced in the mortgage, in part payment of which I received a receipt signed by Margaret Carswell and Samuel McClellan, by their attorney, E. S. Ely, which signature I know to be genuine, which is herewith attached, for the sum of six hundred dollars, dated April 15th, 1842; sales of the property embraced in the mortgage aforesaid to said Barnes by said Ely must have amounted to twenty thousand dollars, which sale I know to have taken place from having heard Dr. Ely, said McClellan, and Mrs. Carswell speak about it; this sale I heard them speak of in 1843. I know of his selling to William Muldrow some of the property included in the mortgage about the same time. He sold to me. He must have sold to Muldrow a thousand dollars worth of the property.

Question by complainant. If you know, please state whether Dr. Ely furnished any of the money to purchase the land in question; that is to say, the land from Gallaher known as the Rhodes Gentry farm, and inform us who was the real purchaser of said farm from Gallaher.

(Objected to by defendant's counsel.)

Answer. Dr. Ely didn't furnish any of the purchase-money. I bought the farm of Gallaher, and paid the money in gold. I do not recollect how much I paid him, but it was the whole of the purchase-money. My deed on record from Gallaher will show the amount. I had made an arrangement with Mr. Tatlow to furnish me the money, with the condition that I was to sell him the land at a small advance over that it cost me, which sale I accordingly made to him. Dr. Ely had Gallaher's obligation in writing to make him, or his next friend, a deed to said land if the purchase-money was paid by a certain day. Dr. Ely was in Philadelphia at the time, and wrote

me, a few days before the time of redemption expired, that he could not raise the money; that if I could raise I might do so, and get Gallaher to make me a deed. Then it was that I made the arrangement with Tatlow for the money. I went to Saint Charles with the money, with Gallaher's obligation, and an order from Dr. Ely on Gallaher, when he (Gallaher) made me the deed, and on my return I made the deed to Tatlow.

Question by complainant. Where does Dr. Ely reside, and what is his present mental condition?

Answer. He resides in the city of Philadelphia, in Pennsylvania; and, by paralysis, he is diseased in mind and body, and unable to attend to business.

Question by complainants. You spoke of a bill of sale, and same is here presented as exhibit; will you say what you gave for said property, whether money or notes, and if notes, what became of same?

Answer. At the time I gave several notes, part of which notes I paid to Dr. Ely, and part to Dr. McClellan; how much to each I can't say; the last note I arranged with Dr. McClelland, and he sent it to me in Missouri.

Cross-examined by John D. L. Dryden, att'y for defendant Miles.

1st Question by defendant's counsel. Have you ever seen the original of which you say the paper marked Exhibit A. is a copy, since you saw it in Mr. Tuttle's hands in 1843; if so, when and where, and in whose hands did you see it?

Answer. I have seen it but once since, and that was in the hands of Mr. Tuttle, in Saint Louis, in September, 1852, when my deposition was taken in the case of Miles *v.* Gentry.

Question 2d. In your deposition given in 1852, did you give evidence in regard to that original?

Answer. I think I did.

Question 3d. Did you on that occasion read or examine the said original paper?

Answer. I did.

Question 4th. Did you take a copy of said original at either of the times you saw it? If so, why did you take the copy, and where is it?

Answer. I never took a copy of it, but was familiar with the original, and knew the signatures as genuine.

Question 5th. Can you now state the contents of said original? If yea, so state the same.

Answer. I can't state the same fully. The copy filed as Exhibit A. I believe is a true copy.

Question 6th. Can you now from memory give the language of any part of the original? If so, give the same.

Answer. I can't exactly.

Question 7th. When was the paper written, marked Exhibit A., and which you say, in answer to complainants' 2d interrogatory, is a copy; by whom was it written, and where was it written?

Answer. I don't know when, where, or by whom the copy marked Exhibit A. was written.

Question 8th. When and where did you first see the paper marked Exhibit A.?

Answer. I first saw it in this office, since the commencement of the taking of this deposition.

Question 9th. If you cannot, from memory, state the contents, or any part of the contents of the original, how can you say the paper marked Exhibit A. is a copy?

Answer. I was familiar with the original at the time I saw it in the hands of Mr. Tuttle, and read it, and believe the copy to be a true copy, but can't quote it verbatim.

Question 10th. When and where did you first see Dr. McClellan? and when and where Mrs. Carswell?

Answer. I saw them both, for the first time, in the spring of 1843, in the city of Philadelphia, Pa.

Question 11th. Who were present at the conversation between yourself and Dr. McClellan and Mrs. Carswell had in May, 1843, referred to in your answer to the complainant's 3d interrogatory; and where did the conversation occur?

Answer. I conversed with Mrs. Carswell on the subject at the house of Samuel Lamb, in Philadelphia, in the presence of Mrs. Mary Elliott, a granddaughter of Mrs. Carswell, who has since deceased, several of Mrs. Lamb's daughters, and I believe my wife was present. I conversed with Dr. McClellan in his own house, in the presence of my wife and his family. I was at the time staying at his house in Philadelphia, my wife being on a visit to that city.

Question 12th. What gave rise to that conversation with Mrs. Carswell; and who introduced it?

Answer. I don't remember.

Question 13th. What gave rise to the conversation with Dr. McClellan; and who introduced it?

Answer. I don't remember.

Question 14th. Had any one expressed any doubt as to whether Dr. Ely would do as they (Carswell and McClellan) desired him, or as to whether he (Ely) would do right?

(Question objected to by complainant's counsel.)

Answer. Not as I remember. Dr. Ely was then about to be married a second time, and we were speaking of the business as a family matter. Neither Mrs. Carswell or Dr. McClelland was pleased with the match.

Question 15th. On how many different occasions did you have conversations with Dr. McClellan and Mrs. Carswell, or either of

them, on the subject of the mortgage, or of the mortgaged property, and if on more than those mentioned above, when and where, and who was present?

Answer. I had conversations with Mrs. Carswell on several other occasions, and with Dr. McClelland, frequently, but don't remember who was present, if any one, all in the city of Philadelphia, between the spring of 1843 and the year 1850.

Question 16th. Did you ever have any conversation with them on this subject at a time when both Mrs. Carswell and Dr. McClelland were present?

Answer. I never had.

Question 17th. On what occasion, and where was it they (Carswell and McClelland) told you that they permitted Dr. Ely to use the proceeds of the property sold, or the property itself, to pay his debts, as he might please; and who was present, and what induced the statement?

Answer. It was in these conversations in Philadelphia. I don't know the occasion; don't remember who was present. On one occasion, in 1843, I well remember that Mrs. Mary Elliott and several of Mrs. Lamb's daughters were present and in conversation with Dr. McClelland. It was in the presence of his family. I don't remember what induced the statement, except Dr. Ely's second marriage.

Question 18th. On what occasion, and where was it that Mrs. Carswell and Dr. McClelland told you that Dr. Ely had a right to dispose of the mortgaged property and pay his debts?

Answer. In the same conversations.

Question 19th. Is there any relationship existing between you and Dr. Ely; and if so, what; and was there any relationship between you and Mrs. Carswell and Dr. McClelland, and if so what?

Answer. I married Dr. Ely's daughter, my now wife, who is a sister of Mrs. Dr. McClelland, and granddaughter of Mrs. Carswell.

Question 20th. Did not Dr. McClelland and Mrs. Carswell both own lands in the counties of Marion and Ralls, in this State, from 1836 till the period of their respective deaths?

Answer. I think they did.

Question 21st. Did you not, about the year 1843, obtain possession of about 400 acres of land, which is included in the mortgage from Ely to Carswell and McClelland?

Answer. I think I did. (Question and answer both objected to by complainant's counsel.)

Question 22d. Did you not, about the year 1843, or since that time, convey to your wife some part of the lands embraced in said mortgage?

Answer. I did. (Question and answer objected to by complainant's counsel.)

Question 23d. What are your feelings towards the defendant Miles; friendly or unfriendly?

Answer. I have nothing against him, that I know of. I have no interest him now, and further the deponent saith not.

JAS. H. PATTERSON.

*Exhibit A. Letter from Carswell and McClelland to Tuttle.*

PHILADELPHIA, October 9th, 1843.

DANA C. TUTTLE, Esq.

Sir: Being desirous to bring the business in which we are concerned, as mortgagers of the Rev. Ezra Stiles Ely, to as speedy a close as possible, we request of you, as soon as the law will allow, to take out execution on all the property mortnaged to us (on which, as our attorney in fact, he has confessed judgment), and proceed to sell all or so much of it as may be necessary to meet the amount of the judgment confessed.

The terms of sale we wish to be cash down at the time of sale, and delivery of deeds of land purchased, unless we shall otherwise direct at the time, through our attorney in fact.

Yours respectfully,

(Signed) SAMUEL McCLELLAN,
MARGARET CARSWELL.

P. S. In order to prevent any unnecessary sacrifice, I wish you to purchase in my name, in trust for the creditors, according to the mortgage, all the property which may otherwise be sacrificed at the sale.

(Signed) SAML. McCLELLAN.

*Exhibit B. Bill of Sale Ely Patterson.*

This 1st day of Feb., A.D. 1842, I have sold to James H. Patterson, of Ralls county, each and every one of the following articles of personal property at the prices annexed to the same, viz.

| | |
|---|---|
| 14 Yearling calves, at $5 each, | $70 00 |
| 1 Bull, five years old, | 15 00 |
| 1 Bull, of 2 years, | 8 00 |
| 1 Yoke of oxen, Ben and Dick, | 40 00 |
| 1 Yoke of oxen, Buck and Bulley, | 30 00 |
| 1 Black ox. old Buck, | 12 00 |
| 1 White and red spotted ox, Mark, 5 years old, | 20 00 |
| 1 Black and brown yoke of four years old, | 25 00 |
| 1 Black and white ox, four years old, | 12 50 |
| 1 Pair of red steers, three years old, | 25 00 |
| 1 Pair of brindled red and white steers, 3 years old, | 20 00 |
| 1 Pair of 3 year old stallions, | 20 00 |
| 8 Head of 3 year old cattle, | 80 00 |
| 10 Cattle, 2 years old, | 80 00 |

| | |
|---|---|
| 1 Old spotted cow, | $10 00 |
| 1 Spotted cow, of five years of age, | 16 00 |
| 1 Old red cow, | 10 00 |
| 1 Bob-tailed young red cow, | 10 00 |
| 1 pale red and white long cow, | 16 00 |
| 1 Black and white long cow, | 16 00 |
| 1 Spotted Downing cow, | 16 00 |
| 1 Old no-horned cow, | 9 00 |
| 1 Young no-horned cow, | 12 00 |
| 1 No-horned steer, 4 years old, | 12 50 |
| 2 Downing heifers, 3 years old, | 20 00 |
| 4 Young cows, of 3 and 4 years, | 40 00 |
| 4 Other head of horned cattle, | 32 00 |
| 1 Bay mare, Minerva, aged about 14, | 40 00 |
| 1 Bay mare yearling colt, | 15 00 |
| 1 Bay horse colt, 2 years old, of the Bradley mare, | 30 00 |
| 1 Bay horse colt, 1 year old, | 25 00 |
| 1 Dark iron-gray yearling colt, | 20 00 |
| Carried over, | 807 00 |
| To amount brought forward, | 807 00 |
| 1 iron-gray mare, 4 years old, | 40 00 |
| 1 Brown gelding, of 4 years, | 50 00 |
| 1 Bay gelding, 5 years old (called Jim), | 50 00 |
| 1 Bay gelding, about 8 years old (called Jores), | 75 00 |
| 1 Roan horse colt, 3 years old, | 30 00 |
| 1 Winnowing fan, damaged, | 10 00 |
| 1 Dearborn wagon, old and injured, | 30 00 |
| 1 Two-horse wagon, with elliptical springs and harness, | 50 00 |
| 1 Ox wagon, | 40 00 |
| 1 Chaise and harness, | 100 00 |
| 1 Surveyor's compass, | 60 00 |
| 1 Harrow with iron teeth, | 8 00 |
| 1 Patent revolving rake, | 4 00 |
| 7 Ox chains, | 7 00 |
| 4 Ox yokes, with staples and rings, | 8 00 |
| 6 Plows, with 6 swingle trees and 8 trace chains, | 36 00 |
| 1 Cultivator, much injured, | 1 00 |
| 1 Iron safe, | 200 00 |
| 1 Woman slave, named Melinda, and her infant, | 400 00 |
| 1 Slave, named Jane, and child of Melinda, | 100 00 |
| 1 Slave, named Eliza, and her two children, | 500 00 |
| 3 Mahogany bedsteads, with beds and bedding, and mattresses, | 100 00 |
| 3 Bureaus, | 30 00 |
| 2 Mahogany, and 2 walnut tables, | 20 00 |
| 2 Dressing-glasses, | 5 00 |

| | |
|---|---|
| 10 Cane-bottomed chairs, | 20 00 |
| 12 Windsor chairs, | 12 00 |
| 1 Pine wardrobe, | 5 00 |
| 1 Book-case and desk, | 8 00 |
| 1 Book-case, with medicine boxes, | 10 00 |
| 600 Vols. of books now in Missouri, | 600 00 |
| 3 Iron stoves, | 36 00 |
| 4 Pair of andirons and 4 pair shovels, and tongs, | 12 00 |
| A lot of knives, forks, tubs, kettles, barrels, crockery, china-ware, and kitchen furniture, and glass, | 100 00 |
| 4 Wash-stands, | 4 00 |
| 1 Cross-cut saw, | 4 00 |
| 3 Hand-saws, with sundry planes and chisels, | 5 00 |
| 50 Stone hoss, more or less, | 75 00 |
| 2 Rocking chairs, | 6 00 |
| 1 Cherry tree cupboard, | 8 00 |
| An apothecary establishment, including glass jars, phials, medicines, scales, glasses, &c., | 50 00 |
| 3 Maple bedsteads, with bed and bedding, | 50 00 |
| 4 Carpets (1 Turkey and 3 Ingrain), | 75 00 |
| 1 Large looking-glass, | 20 00 |
| 5 Travelling trunks, | 15 00 |
| 1 Set of boring irons and 2 sledges, | 8 00 |
| 3 Axes, 2 spades, and two shovels, with two cradles, | 10 00 |
| | 3,894 00 |
| Carried over, | $3,894 00 |
| To amount brought over, | $3,894 00 |
| A set of silverware, consisting of two tea pots, one coffee pot, one castor, one cake basket, one sugar bowl, one slop bowl, one cream vessel, one soup ladle, two small ladles, sugar-tongs, two butter knives, four tumblers, and sundry large and small spoons and forks, | 1000 00 |
| | $4,894 00 |

To the above articles delivered to him, I have this 1st day of February, 1842, received of James H. Patterson, in full, four thousand eight hundred and ninety-four dollars.

Witness my hand and seal.

EZRA STILES ELY, [SEAL.]
for himself and
EZRA STILES ELY,
Attorney in fact for Margaret Carswell and Samuel McClelland.

*Exhibit C.*

Receipt from Ely.

Received, April 15th, 1842, of Abram Barnes, by his attorney, James H. Patterson, six hundred dollars, in part payment of his purchase-money, due for the mill and farm sold him in Ralls county.

$600. MARGARET CARSWELL & SAMUEL McCLELLAND, By their attorney, E. S. ELY.

*Deposition of William Forman.*

The said William Forman, being first carefully examined, cautioned, and sworn to tell the whole truth, deposeth and says, that he lives in the County of Ralls, in the State of Missouri, a greater distance from the city of Saint Louis than one hundred miles: furthermore he saith, that he first became acquainted with Dr. Ezra Stiles Ely in the year 1836 or 1837. I do not know certain which year. I was intimately acquainted with him up to the time in which he left the State. Dr. Ely came to the State of Missouri either in the year 1836 or 1837, and the year after Mrs. Margaret Carswell came. I then became acquainted with her; she lived with Dr. Ely, and made her home at his house. I have no recollection of ever seeing her at any other place, from the time he arrived here until the time of his leaving. I was frequently called on by Dr. Ely to take his acknowledgment of deeds in the capacity of a county court justice; on one single occasion, I took his acknowledgement to fifty-six deeds. Mrs. Dr. Ely and Mrs. Margaret Carswell were always present at the time I took his acknowledgment to any deeds. On one occasion, when I was called to Dr. Ely's house to take the acknowledgment of himself and wife to certain deeds, and after Dr. Ely had become embarrassed. My best impression is it was in the year 1839 or 1840. He, Dr. Ely, said to me, he had conveyed, as I recollect, by mortgage, his property to his mother-in-law and his son-in-law, Mrs. Carswell and Dr. McClelland, to secure them, as they were his securities, as guardians of his ward (who, afterwards, as I learned, married one Thomas Miles); that he had put in the mortgage a great deal more property than was necessary to secure them, for the purpose of protecting it from being sold and sacrificed by his creditors; and that he did not intend to defraud them, as he had a power of attorney from Mrs. Carswell and Dr. McClellan, authorizing him to sell any or all of his property to pay his debts, and that he intended to sell and pay them. Mrs. Carswell was present, and in the hearing of Dr. Ely, during this conversation between Dr. Ely and myself, and took part in it. My recollection is, that Dr. Ely on that occasion said that the property in the deeds then acknowledged, was also

in the mortgage to Carswell and McClelland, and this, as I think, gave rise to the statement made to me by him, as above given. Mrs. Carswell was not only present and heard, and took part in the conversation between Dr. Ely and myself, but manifested an interest in the business then *cered.*

Cross-examination by Defendant's Attorney.

Dr. Ely resided in Marion county during his entire stay in Missouri. Mrs. Carswell resided with Dr. Ely. I did not take the acknowledgment of the mortgage from Dr. Ely to Mrs. Carswell and Dr. McClelland, spoken of in my direct examination. My impression is, that it was taken by Allen G. Gallaher, and I think that Dr. Ely told me so. During the stay of Dr. Ely in Missouri, I took the acknowledgment of a great many conveyances from him. I also took the acknowledgments of conveyances for Mrs. Carswell. I did not take the acknowledgment of the power of attorney, spoken of from Mrs. Carswell and Dr. McClelland to Dr. Ely. Mrs. Carswell was frequently present when conveyances were being made by Dr. Ely and his wife, and frequently manifested considerable interest. She often remarked, that she was afraid he was doing business in a very loose manner. The conversation here detailed in my direct examination, took place at Dr. Ely's house.

My age at the present time is fifty-nine years past. I do not think that my memory is at all impaired. I resided in Ralls county during the stay of Dr. Ely in Missouri. I derived my authority to take the acknowledgments of deeds, by being a justice of the peace, and a justice of the County Court of Ralls County. I have a son-in-law by the name of James W. Gentry, who is a son of Moses Gentry. Further deponent saith not.

WILLIAM FORMAN.

*Deposition of Mary Ann M. Patterson.*

The said Mary Ann M. Patterson was introduced as witness on part of complainant, and being first carefully examined, cautioned, and sworn to tell the whole truth, deposes and says: that she lives in the city of Hannibal, in the County of Marion, State of Missouri, at a greater distance from St. Louis than 100 miles: and further saith, that she was acquainted with Dr. McClellan and Mrs. Margaret Carswell, and met them frequently, between the years 1837 and 1845.

Question by complainant's attorney. Had you any conversations with them within the period related in regard to a deed of trust, or a mortgage made by Dr. E. S. Ely to them? If so, please state what passed.

Answer. I had frequent conversations with them within those

years. Mrs. Carswell was living in the house with Dr. Ely, before and after he executed the deed of trust and mortgage.

After making the deed of trust, he went to Saint Charles, to consult Mr. Bates, and Mr. Bates advised him to make a mortgage, instead of the deed of trust, to the property. On his return home he consulted with Mrs. Carswell, and executed a mortgage to Mrs. Carswell and Dr. McClellan, for the benefit of Mary Ann Carswell, and other creditors. This was done with Mrs. Carswell's approbation and consent, as I remember of hearing them talk together at that time about it; I was comparatively young at that time, say about eleven years old, but I have a distinct recollection of the transaction. I have heard Mrs. Carswell speak of the existence of this mortgage a number of times. Since that period, I think Mrs. Carswell was in Missouri three times, between the years of '36 and '40. She always made her home while in Missouri with Dr. Ely, and was well acquainted with his business affairs. I heard her speak of this mortgage during those visits, and upon two different occasions, after her removal to Philadelphia. I had frequent conversations with Dr. McClellan, during the winter of '42 and '43, from the last of November until the middle of May. Dr. McClellan and Mrs. Carswell always expressed entire confidence in Dr. Ely, and seemed to think he would do what was right towards Mary Ann Carswell and his other creditors, mentioned in the mortgage.

They were aware of this mortgage, and frequently spoke of having given Dr. Ely the power of attorney to dispose of the property mortgaged as he saw fit. They, McClellan and Mrs. Carswell, knew that Dr. Ely was disposing of this property in various ways as he thought best at the time, for the payment of his debts generally.

Question by complainants. Was there anything said in the conversations to which you alluded concerning the mortgage aforesaid, about preventing a sacrifice of the property? If so, what?

Answer. I cannot remember what was said on that subject; there was something said about that, but what it was I do not remember.

Question. Is the letter shown to you and marked Exhibit D., and attached to this deposition, in the handwriting of Dr. McClellan, and was it written to you and received by you in due course of mail?

Answer. I am well acquainted with the handwriting of Dr. McClelland, having seen him write often; the letter shown was received by me from Dr. McClelland in due course of mail, after its date, and is signed by Dr. McClelland as he sometimes signed letters written to me, and the letter is in his handwriting.

Cross-examined by defendants' counsel.

1st. What relationship, if any, exists between yourself and Dr. Ely?

Answer. He is my father.

2d question. Where were you residing at the time of the making of the deed of trust and mortgage of which you have spoken?

Answer. With my father at West Ely in Marion county, Missouri.

3d question. Did you accompany your father on the visit of which you have spoken to Mr. Bates in Saint Charles?

Answer. No, sir.

4th question. Where did Dr. McClellan reside from 1836 to the time of his death, and was he ever, of your knowledge, within that period in Missouri?

Answer. He resided in the city of Philadelphia, Pennsylvania, during the time mentioned. He spent the summer of 1836 or 1837, I don't know which, with his wife, in Missouri. With that exception I have no knowledge of his ever having been in Missouri.

5th question. When did you next see Dr. McClellan after his visit to Missouri of which you have just spoken?

Answer. I next saw him in Philadelphia in the winter of 1837–8, then again the next time I saw him was the winter of 1839–40, in Philadelphia. Afterwards, next again in the winter of 1842–3.

And further this deponent saith not.

MARY ANN M. PATTERSON.

*Exhibit D. Letter from McClellan.*

PHILADELPHIA, August 2d, 1843.

Dear James and Dolly:

You may, no doubt, be a little disappointed in not hearing from me before, in answer to your letter, which I received in due time, as well as the one from the upper college. But as I wished to have a general understanding of the business before I wrote, I have deferred until this time. Dr. and Mrs. E. returned from their tour to the north three or four days since, and will leave here on Monday for Missouri. I have had some talk about the business, and he goes out with the intention to foreclose the mortgage at once, and settle up the business out there. This will be the only safe thing that can be done in the present state of things, and to revoke the power of attorney would not mend the matter, as unless the property was sold out and bought in, it would, I conceive, be just as liable as it now is. I hope he will attend to it and not change his mind, but the true source of all his trouble is that he has no fixed principle of business, but is governed by the circumstances of the moment. This I have found to be the case from all his *corrispondence* for the last several years, and hence the one like Muldrow, who gets hold of him last, if he can bring him to act, has the best chance of getting his ends answered. He has promised me, and I believe intends to make over to you both some of his lands, and I have told him it was his duty, so far as he could do it without defrauding his creditors, to provide for his daughter, and hence his letter to Mr. Barnes, for which I am perfectly willing to take the credit. Barnes has now made some new proposition, which the Dr. can explain to you, but I have little

faith in his promises, and shall insist, in case of his failing to comply with the terms, that you should be allowed to take his place in the purchase. I have told the Dr., too, if he expects to have peace in his family, he must make some provision for his children, for they will not be satisfied with his conferring his property on his new wife and her children to their exclusion. All I ask of him is to free me from the obligation I am under for him, when I will endeavor to take care of my wife myself. I trust he will be able to arrange to pay off Capt. Toby's claim from his sales in the West, for I wrote him, while at New York, that the income of the property here must go to liquidate the mortgage on the South Second street house, in order to prevent the sacrifice of the property, which may otherwise take place. One of the houses is now vacant, and the other will be next month, and I do not know how soon they will be rented; but I shall certainly hold on to the income for the time to come until the mortgage is paid off, when there will be about five or six thousand dollars for each of the children, to be hereafter divided. There are about three quarter sections of land standing in Mrs. Mary Ann Ely's name somewhere in Monroe or Ralls county, which also is to be divided among her children; and this, as far as I can learn, is all. I believe, however, when he made over what he has (how much I do not know) to his present wife, he intended at the time to convey to you some lands on terms he thought might be equivalent to your share, and I trust he will do so still, but for Margaret and myself, we shall have nothing to expect, except what I have now got. I am the more anxious, therefore, that he should not have me to pay this two thousand dollars to the United States Bank, and hope you will use what influence you have with him, to make him do something for me instead of Muldrow & McKee. I do not believe he has any dishonest intentions whatever, but he conducts his business in a strange mode, or rather without method. I should feel distressed to have the harmony of our family broken up, while I believe it our duty to take care of ourselves. I have never expected anything from him, as I believe his debts will take all or more than he owns to pay. When freed from my obligations my thoughts will turn seriously to the West, as I am tired of this anxious mode of life, and would be ready to go next year, if freed from these embarrassments. What think you of my river bottom lands for a *tobbacco* plantation? I sometimes think we could make money together on it, but I do not at present know.

Thursday evening. I was called out last evening before I had time to finish this, to attend on Ann Eldridge (Coyn that was). She had a fine son this forenoon, at which they are greatly pleased. I received a letter from Margaret this afternoon, dated at East Greenwich, R. I., yesterday. She is getting better; has been to Newport and Providence, and wishes to go to Boston. She enjoys herself greatly riding about the Narragansett Bay and riding about the

country. She will not return here before the 20th of this month. Mary and Elliott were at Newport before Margaret went down, and told Hannah Hollingsworth all her grievances, and I suppose I shall hear all about it by and by. Dear, injured, innocent soul! she says I have treated them shamefully; but, as the little boys say, I mean to behave worser still. I have not seen them since their marriage, and do not intend to. Aunt Lamb talks and acts as if the old Nick was in her, but she must let Margaret alone, or she will find she has a hard-trotting horse to ride. She told Ben a strange medley. She really must love us all dreadfully. I am really glad little Tom is doing so well, and hope for better times for us all. The mail is about to close and I must stop, with my warmest love to you both.

S. McC.

*Deposition of William Muldrow.*

Deposition of William Muldrow, being upon interrogatories and as follows: Interrogatory 1st.

1st. Where is your present abode, and how long have you abided there?

2d. Are you acquainted with Ezra Stiles Ely, Margaret Carswell, or Samuel McClelland, if so, how long and where?

3d. Have you any knowledge of any conveyance by said Ely of any property to Carswell and McClelland? What have you heard said Ely say on the subject, if anything? State fully, and where, and when.

4. What have you heard, if anything, said Carswell say on the subject? and when and where? state fully.

5. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

S. T. & A. D. GLOVER,
Solicitors for Complainant.

Cross-interrogatories exhibited on the part of the defendant Thomas J. Miles.

1st. If in answer to direct interrogatory No. 3, you say that you have any knowledge of the consequence therein mentioned, and that you have heard Ely speak of it, state whether any other persons, and if any, who, besides yourself and said Ely, were present on such occasion? State fully and particularly.

2d. If you say that at this distance of time you remember the words used by Ely, or the substance of them, state in what manner and by what means you retain recollection of an event so long past?

3d. Had you any interest in the matter, or have you from feeling

to either party, or to Ely, any wish for the determination of this cause in any particular way?

4th. If, in answer to interrogatory 4th, you say that you have heard Mrs. Carswell say anything on the subject, be particular in saying what year and what time of the year it was, and who besides Mrs. Carswell and yourself were present on the occasion?

5th. Has any person conversed with you on the subject of the present inquiry, or written to you respecting the same within the last three years? If yea, state who has done this, and what has been the substance of such conversation or written communication. If you have any such written communication, please produce it, and annex it to your answer. If you have had any such communication, but have lost or mislaid the same, state when it was so lost or mislaid, and the circumstances of such loss or mislaying?

6th. The present suit is instituted for the purpose of invalidating a deed purporting to be made by E. S. Ely, to secure a large debt due to his ward, Mary Ann Carswell; state whether you did not as a creditor of said Ely attack said deed, as giving an undue preference to said ward, and state whether you can distinguish in your memory now the impressions upon your own mind made by other persons and circumstances respecting said deed from what the said Ezra Stiles Ely or the said Mrs. Carswell may have said respecting the same.

THOS. T. GANTT,
Solicitor of TH. J. MILES.

Answer to interrogatory 1st. My present residence is in Sacramento county, about half a mile from Sacramento city, at which place I have resided since 1849.

Answer to interrogatory 2d. I am acquainted with Ezra Stiles Ely, Margaret Carswell, and Samuel McClelland. I have known each of them since 1836. I first knew them in Philadelphia, and afterwards I knew E. S. Ely and Mrs. Carswell in Missouri.

Answer to interrogatory 3d. I have a knowledge of the conveyance of property by Dr. Ely to Carswell and McClelland. It was a conveyance of a large amount of real estate and personal property by Dr. E. S. Ely in trust to Margaret Carswell and Samuel McClellan, to secure a debt to Mary Ann McClellan, the granddaughter of Mrs. Carswell, and ward of Dr. E. S. Ely.

I have heard Ely say that he deeded this property in trust, as above stated, to secure said debt to Miss Carswell and his other creditors, who would indulge him for a term of more than one year. Said time can be ascertained precisely by reference to the deed on record in Marion county records, which I have read on said records. Ely's avowed object, as he told me, was to get time for the payment of his just debts, and to prevent his creditors from sacrificing his property.

Answer to interrogatory 4th. I don't think I have ever heard Mrs. Carswell or Mr. McClellan say anything about the conveyance of the property or the object thereof.

Answer to interrogatory 5th. I don't think that I can state anything further that is material in the matter at issue.

On the cross-examination, he says, in answer to interrogatory 1st: I do not recollect whether any person was present, nor do I remember the place or date of the conversation. It was about the date when the deed was executed, or the date it was recorded, which was about the same time.

Answer to cross-interrogatory second. I do not recollect the particular words used by Ely, but they were in substance as stated in my answer to direct interrogatory third. I recollect this matter from the fact that I was deeply interested in the winding up of Dr. Ely's estate, on account of his owing me a large amount of money at the time.

Answer to cross-interrogatory third. I have no interest in the result of this suit in any way, and no preference that the one or the other party should gain or lose.

Answer to cross-interrogatory fourth. I have never heard Mrs. Carswell say a word about it, as I before answered to direct interrogatory fourth.

Answer to cross-interrogatory fifth. I have never received a letter directly from anybody on the subject. Mr. Glover wrote a letter to Mr. Buckner, which he (Buckner) gave to me for the purpose of ascertaining what I knew about the matter, and requested me to answer Glover's said letter, which I did. There was no request in the letter stating what he wished me to testify; his request was, that I should refresh my memory, and give him all the information I could on the subject. I have no letter from Glover to me. The letter which Mr. Buckner gave me from Glover, I answered, and don't know what I did with it afterwards, it being of no importance to me.

Answer to cross-interrogatory sixth. I did attack the validity of the deed made by E. S. Ely to Mrs. Carswell and McClellan, being the deed above alluded to, and before the suit was terminated, the matter was compromised, and Ely paid me to my satisfaction. The statements I have made are from my own recollection, without the suggestions or influence of others.

*Power of Attorney. Margaret Carswell to E. S. Ely.*

Know all men by these presents, that I, Margaret Carswell, widow, of Marion county, in the State of Missouri, have made, constituted and appointed, and by these presents do make, constitute and appoint, and in my place and stead put and depute the Rev. Ezra Stiles Ely, of said county, to be my true and lawful attorney, for me, and in my name, and for my use, to ask, demand, sue for,

levy, recover, and receive all such sum or sums of money, debts, rents, goods, wares, dues, accounts, and other demands whatsoever, which are or shall be due, owing, payable, and belonging to me, or detained from me by any manner or means whatsoever, and especially for me, to lease any of my real estate in Missouri, and to sell any of my personal estate which he may deem best to sell, and at any time to remit or release from mortgage any property and all property mortgaged to me by my son-in-law, Dr. Ezra Stiles Ely, of said Marion county, to secure the payment of certain debts, in whatever county said property may happen to be and is situated, and to bargain, sell, convey, and deed to the said Ezra Stiles Ely, or to Dr. Samuel McClellan, of the city of Philadelphia, or their lawful heirs, each and every portion of land to which I have, by covenant, secured to them, severally, a pre-emption right, so soon as they respectively shall, or either of them shall have fulfilled the covenants on which said pre-emption has been by me secured to them, or either of them; giving and granting unto my said attorney, by these presents, my full and whole powers, strength and authority, in and about the premises, to have, use, and take all lawful ways and means in my name for the purposes aforesaid; and upon the receipt of any such debts, dues or sums of money, acquittances, or other sufficient discharges, for me and in my name to make, seal and deliver, and generally all and every other act or acts, thing or things, device or devices in the law whatsoever needful and necessary to be done in and about the premises, for me, and in my name to do, execute, and perform as full, largely and amply, to all intents and purposes, as I might or could do if I were personally present, and attorneys, one or more, under him, for the purposes aforesaid, to make and constitute, and again at pleasure to revoke; hereby ratifying, allowing, and holding for firm and effectual, all, and whatsoever my said attorney shall lawfully do in and about the premises, by virtue hereof.

In witness whereof I have hereunto set my hand and seal, this twenty-sixth day of March, in the year of our Lord one thousand eight hundred and thirty-nine.

MARGARET CARSWELL. [SEAL.]

State of Missouri, County of Marion, *ss.*

Be it remembered, that on the 26th day of March, A.D. 1839, before me, Allen Gallaher, one of the justices of the peace in and for the county and State aforesaid, personally came the within-named Margaret Carswell, widow, whose name is subscribed to the within-named power of attorney, as having executed the same, and acknowledged the same to be her act and deed, hand and seal, for the purposes therein mentioned.

In witness whereof, I have hereunto set my hand and seal, this day of March last above named. ALLEN G. GALLAHER, [SEAL.]
J. P.

State of Missouri, County of Marion, *ss.*

In the Recorder's office.

I, John P. Rutter, recorder in and for said county, do hereby certify, that the within and foregoing instrument of writing, together with the certificate thereon, was received by me for record on the 15th day of October, A.D. 1842, and that the same has been duly recorded in my said office, book J., for recording conveyances, &c., at pages 315 and 316.

Given under my hand and seal of office; done at Palmyra, in said county, this 17th day of October, 1842.

JOHN P. RUTTER,
Recorder.

*Power of Attorney. Samuel McClellan and wife, to Dr. Ely.*

Know all men by these presents, that we, Samuel McClellan, of the city of Philadelphia, physician, and Margaret C. McClellan, his wife, have made, constituted and appointed, and by these presents do make, constitute and appoint Rev. Ezra Stiles Ely, D.D., of Marion county, State of Missouri, our true and lawful attorney, for us, and in our names and on our behalf to ask, demand, recover and receive all and any sum of money, debts, dues, merchandise, or effects, due, payable, coming or belonging, or which may at any time be due, payable, coming or belonging unto us from any person or persons whatsoever, to sell, barter, exchange or dispose of any real estate of which we are now seized or possessed, in fee simple, or for any less estate, to any person or persons, for any price, and in any manner whatsoever, and for these purposes to execute and acknowledge any deed or deeds, or other assurance or assurances, with general covenants of warranty against all persons, or any other covenants whatsoever, as he may deem expedient, to purchase any real estate on our account in fee simple or otherwise, at any prices or any exchange whatsoever, and for these purposes to receive, confirm, make, and execute any contracts, deeds, conveyances, or other instruments whatsoever, and for all or any of these purposes to make and execute any releases, compromises, compositions, agreements or contracts, by deed or otherwise, in his opinion necessary and expedient in the premises; to pay and discharge all debts and demands due and payable from us unto any person or persons whatsoever; to enter into any lands or other real estate to which we are or may be entitled, and recover the possession thereof, and damages for any injury done thereto, commence and prosecute unto final judgment and execution, any suit or suits, action or actions, real, personal or mixed, which he shall deem proper for the recovery, possession or enjoyment of any matter or thing which is

or may be due, payable, owing, belonging, accruing or appertaining to me, for, or by reason of the premises or any part thereof, and in such suits or actions for us to appear and plead before any courts or tribunals having jurisdiction thereof, and all stipulations, recognizances, and other requisites in any suits or actions, and any question arising on the same, by arbitration or other compromise, and of all receipts and recoveries in the premises, due acquittances and discharges to execute and deliver, and generally to do and perform all matters and things, transact all business, make, execute, and acknowledge all contracts, orders, deeds, writings, assurances, and instruments which may be requisite or proper to effectuate all or any of the premises, or any other matter or thing appertaining or belonging to me, with the same powers, and to all intents and purposes, with the same validity as I could, if personally present; hereby giving and granting unto our said attorney full power to substitute one or more attorney or attorneys under him, my said attorney, in or concerning the premises or any part thereof, and the same at his pleasure to revoke; and hereby ratifying and confirming whatever my said attorney or his substitute or substitutes shall and may do by virtue hereof in the premises. And whereas the said Rev. Ezra Stiles Ely, D.D., has heretofore, as our attorney, exercised the powers aforesaid, or some of them, and has as our attorney executed and acknowleged divers contracts, writings, deeds and instruments in our behalf, in and about the premises, and other matters and things: now we do hereby ratify and confirm all the doings of the said Rev. Ezra Stiles Ely, D.D., as our attorney in all matters and things by him transacted, performed, done and executed, at any time before the execution of these presents, to all intents and purposes whatsoever.

In witness whereof we have hereunto set our hands and seals this fifteenth day of October, Anno Domini one thousand eight hundred and forty-two.

SAML. McCLELLAN. [SEAL.]
M. C. McCLELLAN. [SEAL.]

Sealed and delivered in
presence of
GEO. GRISCOM,
M. W. CARSWELL.

State of Pennsylvania, City of Philadelphia, *ss.*

On this fifteenth day of October, A.D. 1842, before me the subscriber, an alderman of said city, and ex officio a justice of the peace, appeared Samuel McClelland, M.D., and Margaret C., his wife, and severally acknowledged the within written instrument to be their act and deed, and desired that it might be recorded as such. And the said Margaret C., on a private examination by me, separate and

apart from her husband, acknowledged that she executed the said deed without any compulsion or restraint on the part of her husband.

Given under my hand and seal.

GEO. GRISCOM,
Alderman and ex-officio Justice of the Peace.

Pennsylvania, Philadelphia County, *ss.*

I, Samuel Hart, Esquire, prothonotary of the Court of Common Pleas of said county, do certify that Geo. Griscom, Esquire, before whom the foregoing acknowledgment was taken, and whom his own proper handwriting has thereunto subscribed his name, was at the time of so doing, and now is, an alderman in and for the city of Philadelphia, and ex-officio a justice of the peace, duly commissioned and qualified, to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as thereout.

In testimony whereof I have hereunto set my hand and affixed [L. S.] the seal of the said court at Philadelphia, this 15th October, 1842.

S. HART,
Prothonotary.

State of Pennsylvania, City and County of Philadelphia, *ss.*

Be it remembered, that on this sixteenth day of February, A.D. 1843, before me, Edward C. Dale, prothonotary, or chief clerk of the District Court in and for the city and county of Philadelphia, personally came Samuel McClelland, M.D., and Margaret C. McClelland, his wife, well known to me to be the persons whose names are subscribed to the foregoing instrument of writing as having executed the same, and acknowledged the same to be their act and deed, hands and seals, for the purposes therein mentioned. And she, the said Margaret, being examined separate and apart from her husband, and having been made acquainted with the contents thereof, declared that she had executed the same freely of her own accord, without any fear, constraint, or undue influence of her husband.

In witness whereof I have hereunto set my *my* name, and the [L. S.] public seal of said court, which is a court of record, on the day and date last above written.

EDWD. C. DALE,
Prothonotary or Chief Clerk.
Prothonotary or Chief Clerk of District Court, &c.

*Jonathan J. Robinson's Deposition.*

I am the son of the late Mrs. Margaret Carswell, by her first marriage. I am the only child by the first marriage.

Question. Have you any interest, direct or indirect, of any kind,

in the present suit between Caldwell and Miles or its subject-matter?

Answer. I have none.

Mrs. Carswell went first to Marion with Dr. Ely in, I think, 1835. I went with them. She must have returned in the fall of that year. She went out in the spring and returned in the fall.

The relation of intimacy existing was that of mother and son. I don't recollect that at that time I had any particular business transactions with her. I was partially acquainted then with the state of her affairs. I was more fully acquainted afterwards, when it became necessary to make investigation. I am the executor, sole executor, of the late Mrs. Carswell, and was for several years before her death consulted about her affairs. She died in May, 1851. I am now seventy years old. Purchases of lands were made in Missouri with Mrs. Carswell's funds in 1835 and some in 1836. She owned, at her death, of Missouri lands about 3000 acres. Her lands lay in Marion county and Ralls county, Missouri. She bought a half section in 1835 or 1836 at private sale. I think the deed calls for $4000 as paid for it. She held a mortgage on land in Ralls county to secure the sum of $10,000. I think there was also a mortgage in Marion county as collateral security for a debt of $3220. The mortgage for $10,000 was executed at the close of the year 1837 I think. I rather think the other was also executed about the same time. Mrs. Carswell next went to Missouri in the spring of 1836. I went with her. I think she did not return from Missouri to Philadelphia till the spring of 1839. She never revisited Missouri after her return in 1839. I went out in the fall of 1838 to bring her home. She declined to return in consequence of the ill health of her daughter Mrs. Ely.

I knew Dr. Ely very well. He married her eldest daughter by Samuel Carswell. She was my half sister. Samuel Carswell was my mother's second husband.

Dr. Samuel McClellan married my mother's granddaughter; the eldest daughter of Dr. Ely.

Mrs. Carswell had unlimited confidence in Dr. Ely.

Question. From your knowledge and intimacy with Dr. McClellan and Dr. Ely, and from the course of dealing between them and conduct towards each other, state what the character of that interview and dealing was.

Dr. McClellan was the confidential business man of Dr. Ely, and, from my knowledge of their intercourse and intimacy, I believe that Dr. McClellan and Dr. Ely were very much attached to each other.

The general character of Dr. Ely from 1831 to 1835 and 1836, stood as high as that of any other man in his profession.

Question. Was his general character such at that time as to induce the repose of confidence in him by those who knew him?

His general character was at that time unimpeached in any par-

ticular. I think Dr. Ely first went to Missouri in 1835. He had very large operations and speculations in that State.

My mother gave Dr. Ely a power of attorney about the time she left Missouri in 1839. That power of attorney is on record at Palmyra, Marion County; I have read it. I don't know of any other power of attorney than that on record. She told me she had given no other power. She told me that she gave that power of attorney for the purpose that Dr. Ely should attend to her own private interests in Missouri.

I have some knowledge of a deed of trust or mortgage given by Dr. Ely to Mrs. Margaret Carswell and Dr. McClellan on the 5th Jan., 1838. Dr. Ely made Mrs. Ely Carswell a party to that deed, in order to secure a debt which Dr. Ely owed to Mary Ann Ely Carswell. As a clergyman, Dr. Ely stood in the first rank; in theology, he was proficient. As a business man, he relied on his own intelligence to assist him in drawing his own writings. He would not consult a lawyer as most other men. He had a great deal of self-confidence. I don't think he was a practical business man. I at no time would have relied upon his ability as a business man. I believe he was in the habit of writing his own legal instruments. I have seen deeds in his own handwriting in Missouri. I don't know that I have ever seen the deed of 5th January, 1838.

I know James H. Patterson slightly. He married a daughter of Dr. Ely, I believe about the year 1840 or 1841. He was then living in Missouri, and became acquainted with the Dr. in Missouri. I believe he had a good deal of connection with Dr. Ely in business. Pattersons has spoken to me about Ely's concerns and property first in the fall or winter of 1848. I was then in Hannibal, Missouri. It was with regard to some lands in Ralls County. I made a memorandum of the conversation had with Patterson at that time, speaking of these lands in Ralls County, which he had bought in under foreclosure of the mortgage—no, I correct that; he was speaking of lands which it was uncertain whether he (Patterson) could hold or not. He said that he had a map of the county, which shows all the lands Dr. Ely ever entered, that he knew of lands that no deed of trust, mortgage, or judgment had yet touched, out of which he could pay himself, if he could not hold the land he had bought of Dr. Ely.

Old Samuel Carswell died rich, left a large estate, estimated at that time about $300,000, which he left to his children and descendants. He left the following children: Mrs. Ely, the wife of Dr. Ely; Samuel K., the father of Mary Ann Ely Carswell, who was an only child; Mrs. Lamb, the wife of Samuel Lamb; Matthew Carswell.

These were his only living children at the time of his death. Mrs. Miles was the only child of her father. Mary Ann Ely Carswell was left an orphan at a very early age. She was born about the year 1828 or 1829. On September 5th, 1830, Mrs. Carswell and

Mary Ann Ely Carswell were at my house in Montgomery County. She was then a very little girl. On the 15th July, 1829, I attended the funeral of Samuel K. Carswell.

Dr. Ely had other property, I think, than that included in the trust deed of 5th January, 1838. I knew so from his own letters.

My mother would not speak of her affairs except to those she was interested in. She was not communicative on the subject of, or in relation to, her affairs.

Dr. McClellan invested some money in Missouri about 1835 or 1836. His investment was in 1777 acres, some in Marion County, some in Shelby County, which adjoins Marion and Ralls. Mrs. Carswell was greatly attached to her granddaughter; she brought her up.

Dr. Ely's mind, general report says, is entirely gone.

Mrs. Elliott was my daughter, and died in the spring of 1852.

I have seen William Muldrow often. I have seen him in Dr. Ely's house in Philadelphia. I suppose I saw him several times. There is no doubt that Muldrow's was part of the influencing cause in taking Dr. Ely to Missouri. Whether it was the chief influence, I can't say. No doubt he had an influence. Muldrow had not the confidence of the people of Missouri. I can't name any special person, but the impression made on my mind from conversations with the people in Missouri was that he had not their confidence. This was from 1835 to 1838. He owned a farm in the neighborhood of Palmyra. He was a speculator. He made a very good speculation for himself at that time, as I have reason to believe.

Cross-examined.

I reside near Jenkintown, in Montgomery County, in this State. When I speak of Mrs. Carswell's investments, I speak of them as derived from documentary evidence, deeds, patents, &c. The deeds and patents will show all I know about her lands.

My knowledge of the consideration of the deed of 5 January, 1838, is derived from the deed itself. I don't know that I ever saw the original deed, and I have no further knowledge on that subject. I saw a copy of it in the paper book.

The general opinion at the time of Samuel Carswell's death, and it was my opinion that he was worth $300,000. I don't remember ever having seen an inventory of his estate. Dr. Ely had other property in 1838 than that mentioned in the deed of trust. There was a church near Fairmount; I know from a letter in which he requests Dr. McClellan to try and negotiate a loan upon it to get money; I don't know if it was unincumbered; the title was in his name; it went as his property. This letter must have been written subsequently to the spring of 1839, when my mother returned from Missouri.

I don't know whether any property he held at that time was incumbered or unincumbered. I don't know the condition of the property.

Re-examined.

I have heard Mrs. Carswell speak of the deed of trust. She was always anxious that her granddaughter's property should be secured, and I believe that Mrs. Carswell would not consent to any act that would impair or lessen the interest which Mary Ann Ely Carswell had in any deed of trust or mortgage which may have been executed for her security.

2. Do you recollect any conversation in connection with this deed of 6th January, 1838, with Mrs. Carswell?

I have no such recollection as will enable me to speak definitely. I cannot answer that question in a way which will be satisfactory to myself or others. I have no doubt there were conversations between my mother and myself with regard to the deed of trust, but I cannot state them.

2. What conclusion did you draw from those conversations as to her action in the deed?

I have testified generally that my mother desired that Mary Ann Ely Carswell should be made whole in her estate; and she had no other wish or desire on that subject so far as I know. She did not wish to be made responsible after the suit was commenced. The suit against her and Dr. McClellan was commenced. Then, of course, she felt that she ought not to be made responsible.

Letter dated December 23d, 1843, handed witness. The body of this letter and the signature is in the handwriting of Dr. Ely, marked A.

Letter dated July 12th, 1844. The body and signature of that letter is Dr. Ely's, marked B. This was found amongst my mother's papers after her death.

Letter dated December 28th, 1844. The body and signature is in the writing of Dr. Ely, marked C.

Letter dated May 23d, 1845, is in the handwriting of Dr. Ely, as also his signature, marked D.

Paper January 13, 1845. The whole of it is in the handwriting of Dr. Ely, marked E. I have frequently seen him write, and know his writing.

I. J. ROBINSON.

*Deposition of Mary Ann McGowan.*

I knew the late Mrs. Margaret Carswell in her lifetime. I lived with her, served and lived with her for years. As near as I can recollect, I went to live with her in 1830. I remained with her until she went to the West. When she returned from the West I

again went to live with her, and remained until she went to the West a second time. I went to Dr. McClellan's some time after Mrs. Carswell went to the West. Dr. McClellan was married to Mrs. Carswell's granddaughter, who was Dr. Ely's daughter. When Mrs. Carswell came back she was very sick, and I was about to leave Dr. McClellan's. Then I nursed Mrs. Carswell. She was quite ill that summer. I think I remained with her about ten months, as near as I can recollect. I was sick when I left there, and went home. I have seen and known Mrs. Carswell frequently after I left her service, and until the time of her death. I am able to speak of her character from my knowledge of her. Mrs. Carswell was a pious, conscientious, good, benevolent woman, so far as I know.

I first became acquainted with Dr. Ezra Stiles Ely about 1829 or 1830. I resided in his family. Mrs. Carswell resided with Dr. Ely while I lived with her. I never heard anything against Dr. Ely at that time. I never saw anything but what was honest, just, and right, so far as I know. He was a prominent Presbyterian clergyman at that time, generally known and influential.

Mrs. Carswell placed great confidence in Dr. Ely and in his character. Dr. Samuel McClellan always bore a very good character as a gentleman of truth and honor.

I knew, at the time I have spoken of, a young lady, who subsequently became the wife of Mr. Miles. Her name was Mary Ann Ely Carswell, and was Mrs. Carswell's granddaughter. She is the wife of Thomas J. Miles, and was brought up in old Mrs. Carswell's family. Her parents were both dead, having died while she was an infant. She resided in Mrs. Carswell's family until she was married. The relation of grandmother and grandchild was always kind. Mrs. Carswell superintended her education. I saw William Muldrow at Dr. Ely's, in Second street, when Mrs. Carswell lived there. I saw him there at least two or three times; certainly twice. I don't know of my own knowledge whether he induced Dr. Ely to go to the West.

Cross-examined.

I reside at 1013 Walnut street. I was seamstress with Mrs. Carswell, and all my knowledge of these affairs is from what I noticed when living in the house as such. I have heard these parties spoken of in different places.

Re-examined.

I suppose I lived some fourteen or fifteen years in Dr. Ely's, Mrs. Carswell's, and Dr. McClellan's families. Mrs. Miles was about three years old when I first saw her, which was about 1829,

1830, or 1831. I think I would know the handwriting of Mrs. Carswell; have seen her write frequently.

Witness being shown entry in Bible published at Philadelphia by Carey & Lea, in 1823, under head of births, "Mary Ann Ely Carswell, born May 10th, 1828, A.D., at Germantown," says: I declare I don't know in whose handwriting it is. It don't look like some of Mrs. Carswell's I have seen since. It is Mary Ann Carswell's Bible. Mrs. Carswell had the Bible, but I can't say when I first saw it.

M. McGOWAN.

*J. B. Southerland's Deposition.*

I was acquainted with Rev. Ezra Stiles Ely as far back as the war of 1812; in 1830, 1831, up to 1835 and 1836. He was as pious and upright a gentleman as I knew; in my opinion, a gentleman of the strictest integrity; and that was his universal character in the community; as much so as any clergyman I knew. He was, like most clergymen, credulous. I saw him in Washington. He was about entering lands in the West. He was about entering lands, had entered some, and I advised him to be careful. He was a good business man as any clergyman. This was a new business, and I advised him to be careful. I can't say if I had reference to any particular person when I advised him to be careful.

I did not know William Muldrow personally. I had heard of the name. I don't know if I cautioned Dr. Ely against Muldrow. There was some one with Dr. Ely in Washington. I cautioned him generally, on account of my belief that he was not competent to carry on that kind of business.

At that time I considered that Dr. Ely could carry on business as well as any of his class.

I think he might have been easily imposed upon by designing persons in the matter of Western lands. I have not the slightest doubt of it.

I knew the character of Mrs. Margaret Carswell well. She was one of the most exemplary ladies I ever knew. That was her character in this community; and from my knowledge of her character, she would not have permitted her name to be used in an improper manner in any deed. She was a lady of character, religious and exemplary, and of undoubted integrity. She was one of the most spotless ladies I ever knew. She was of spotless reputation.

I knew Dr. Samuel McClellan when he was professor of obstetrics in Jefferson Medical College. I was a trustee. He was a man of integrity, distinguished in his profession, and, as far as I know, was as amiable and upright a man as I ever knew.

Question. Do you or do you not believe, from his character, that

he would have allowed his name to be used in a deed in any improper way, or in any illegal transaction?

I certainly believe he would not. I feel confident he would not.

I have represented one district of this city in Congress for ten years. I was assistant law judge of the Court of Common Pleas for the City and County of Philadelphia, and my acquaiatance in this city is very extensive. I am between 67 and 68. I am a graduate of the University of Medicine in 1812; afterwards practised law. I have been speaker of the House of Representatives in this State.

Cross-examined.

I now reside in this city; 1716 Pine street.

As far as a minister can be a good man of business, Dr. Ely was so; but not well qualified for entering lands. He was a good man of business as far as a clergyman could be. He was only qualified for preaching, as all ministers are. My opinion is that clergymen are not well qualified for any business except preaching. I never heard anybody talk of his business capacity in general.

Re-examined.

Dr. Ely, since his return from Missouri, has become entirely imbecile.

J. B. SOUTHERLAND.

*Deposition of John R. Vogdes.*

I have known Dr. Ezra Stiles Ely from about 1820. I knew him until he removed to Missouri, and have known him since his return. I am one of the trustees of Jefferson Medical College; have been so since early in 1838. Dr. Ely has been a trustee since the organization of the college, which was in 1826–7. He was also a trustee of the Jefferson Medical College edifice, and he was, you may say, its founder; which was prior to 1830. He had the building erected, and paid for it; took the deed for it in his own name, and then made a declaration, or deed of trust, stating that it was held in trust for a number of shares of stock.

In the year 1843 there were 59 shares of stock in Jefferson College edifice, of par value $500 each. That has been the number ever since I have had anything to do with the institution, which connection commenced in 1838; there is the same number now.

Prior to the month of November, 1843, those certificates of stock were held as follows.

| | | |
|---|---|---|
| Estate of Clement Lee Brady, | . . . | 2 shares. |
| " Mrs. Dreamer, | . . . . | 2 " |
| " Dr. Jacob Green, | . . . | 1 " |

| | | |
|---|---|---|
| Estate of Mrs. Flickever, wife of D. Henry Flickever, . . . . . | 1 | share. |
| " Horn & Kreass, . . . . . | 1 | " |
| " Mary Ann Ely, now Mrs. Patterson, and daughter of Dr. Ely, . . . | 2 | " |
| The balance Dr. Ely held in trust for his ward, Miss Mary Ann Ely Carswell, the wife of M. Miles, | 50 | " |

After George Sharswood and Frederick A. Raybold became *trustee* of Mary Ann Ely Miles, Dr. Ely transferred to them forty-four shares of the capital stock; this was in the year 1844–5.

The six remaining shares of the fifty above spoken of were transferred to Rev. Doctor Gallaher, of Missouri. He is now deceased. This transfer was before the transfer of the 44 shares to George Sharswood and Frederick A. Raybold, as before stated. I think it was in the year 1843.

The interest on all this stock amounted to $1770 per annum; that interest I, as treasurer of the College, paid in 1843, the 25th November, 1843, to Dr. Ely or Dr. Samuel McClellan. I am certain I paid it to Dr. Samuel McClellan on the 25th November, 1843. I paid it to Dr. Samuel McClellan as agent for Dr. Ely, whose duty it was to pay the interest to the owners of the stock.

A man or any person holding six shares of stock on the 25th November, 1843, was entitled to receive $180.

The character of Dr. Ely from the time I knew him, from 1820 to 1840, was good; he had considerable influence in this community, particularly in his own denomination. He was a man of benevolence, and gave large sums to charity. In 1830, and until the explosion took place in the West, Dr. Ely was regarded as a man of wealth; and prior to the disasters in the West he enjoyed the confidence of this community.

Dr. Ely was not a practical man; he was visionary. He was disposed to place confidence generally in almost everybody. He was a man that might be imposed upon and led into speculation. I mean more so than ordinary men. He was opinionated and strongly wedded to his own views.

I knew Dr. Samuel McClellan from 1828 or 1830 down to the time of his decease, a few years ago. He was an eminent physician —a Professor of Obstetrics in Jefferson Medical College. A man of unimpeachable character, of high integrity, and stood high in this community.

Question. From your knowledge of Dr. McClellan and his character, was he, in your judgment, a man who would have permitted his name to be used in a deed or any legal transaction for an improper or unworthy purpose?

He was not, and would not; I say this strongly. He was a man who would not countenance anything wrong. I knew the character of the late Mrs. Margaret Carswell. I knew her husband well.

Her character was good and exemplary. It stood high in the community; as high as any lady living at that time. She was considered one of the first ladies in this community.

Question. From your knowledge of the character of Mrs. Carswell do you believe she would have lent her name to a deed or any illegal transaction for an improper or unworthy purpose?

I think she would not.

Mr. Samuel Carswell was a man of wealth—an eminent merchant. He left a large property, estimated at $300,000 or $400,000.

Cross-examined.

My knowledge as to the ownership of the different shares of stock is derived partly from the books, and partly from Dr. Ely. All that I know is that the stock stood in the names of the parties mentioned.

My knowledge of the wealth of Mr. Carswell is derived from general rumor—the same as I know that Stephen Girard or George Harrison were men of wealth, or any other man of wealth. Dr. Ely was not a man of general business—had not a complete knowledge of it. He was a clergyman. He was a man capable of taking care of his own affairs, as most men are.

JOHN R. VOGDES.

*Deposition of George Sharswood.*

I was one of the trustees of Mrs. Mary Ann Ely Miles, under her marriage settlement, from the date of that settlement, 1843, up to the time I was discharged by the Court of Common Pleas of Philadelphia County, which was in 1856. Frederick A. Raybold was my co-trustee, under that settlement, until the time of his death, which was about eight years ago. Since that time, and up to my discharge, I was sole trustee. Mr. Raybold and myself, as such trustees, commenced proceedings against Dr. Ezra Stiles Ely. I think I wrote one or more letters to Dr. Ely, and received letters from him in reply. I am sure I wrote one, and perhaps more. The letters either came to Mr. Raybold or myself. I received several from him. I also had several interviews with Dr. Ely.

Letter A. CT. H. was the first letter we received from Dr. Ely.

Letter C. CT. H. was also received by us from Dr. Ely.

Letter D. CT. H. was also received by us from Dr. Ely.

Paper E. CT. H. I also remember to have received. The proceeding instituted by us, as trustees, resulted in a large balance of about $50,000 against Dr. Ely, in favor of Miss Miles, in which account a credit was given for a number of shares of medical stock, which had been handed over to us by Dr. Ely. The amount of the annual interest or rent on these shares was about $1350, and the amount decreed against Dr. Ely was altogether independent of the

stock transferred to us. I always thought there were other shares of stock, six I think, which belonged to Mrs. Miles, and should have been transferred to us, as her trustees. I was appointed the trustee of the Jefferson Medical College edifice after Dr. Ely was removed. I received the annual amount coming to the stockholders from the treasurer, and I disbursed it. The interest on these six shares was paid to Dr. Ely or his agent. The amount of stock that came to Mrs. Miles was 44 shares, at par value of $500 per share, amounting to $22,000, and the amount of interest paid her was $1320 per annum.

Dr. Ely applied for the benefit of the insolvent law. He was opposed by us, as trustee for Mrs. Miles. He was ultimately discharged. We opposed him on the ground of breach of trust, and that under a law of Pennsylvania a person guilty of a breach of trust could not be discharged. The court discharged him on the ground that the breach of trust which had been shown was prior to the act of Assembly which declared that such breach of trust should prevent the discharge of the applicant. By breach of trust I mean appropriating to his own uses Mrs. Miles' property.

Proceedings were commenced by us, as trustees, against Mrs. Carswell and Dr. McClellan, as trustees, under a deed of trust or mortgage of January 5th, 1838.

Question. How did that result?

The decree was in their favor, that they were not liable to account, but were ordered to convey to Mr. Miles, as trustee.

The ground on which the case was opposed by Mrs. Carswell and Dr. McClellan was that they had never accepted the trust to make them liable for account. I infer this was the ground upon which the court decided, though I never have seen the opinion.

Throughout the whole of these proceedings against Dr. Ely and the trustees, Mr. Miles was entirely antagonistic to Dr. Ely, and we acted under his directions.

Cross-examination declined by M. C. Biddle.

GEO. SHARSWOOD.

*Deposition of Robert Steel.*

I am a minister of the Gospel; have been so nearly forty years. I was intimately acquainted with the Rev. Ezra Stiles Ely. My first acquaintance with him began about 1816 or 1817, and continued until he left Philadelphia. I was in frequent intercourse with him. After my ordination I resided about 10 miles from Philadelphia, at Abington, in Montgomery County, where I still live. I belonged to the same Presbytery with him. Dr. Ely always stood high as a man of piety and integrity, and was of great influence in the Presbyterian church in that period.

I had conversation with Dr. Ely on the subject of his ward's pro-

perty. It was on the day of his second marriage, at my house in Abington. I think it was about 1843, I am not certain. I had some conversation about his niece, his ward, Miss Carswell, an orphan, the same lady who subsequently married Mr. Miles. I asked about his property; I felt curious to know how it was situated. He remarked that he had been somewhat embarrassed, but had secured her property, amounting originally to about $30,000 with interest for a number of years. I expressed my gratification that her property was safe, and there the matter ended. Dr. Ely in that conversation said how the property was secured. I am not familiar with legal terms, but I think it was either a deed of trust, or an assignment covering his property to secure her, so that she should not suffer in case of farther difficulty. He considered the matter secured. He stated that he had taken with him and had in his possession $30,000 of her money left by her grandfather, and that the interest had accumulated considerably. I was intimately acquainted with Mrs. Margaret Carswell, visiting in the family when young, and continuing for a period since 1811, upwards of thirty years. Her character for piety, integrity, everything that was expected from a lady of high standing, was unimpeached. I never heard a whisper against her. I knew her well. I knew Dr. McClellan personally slightly. I knew him as connected with Dr. Ely's family. He married Dr. Ely's eldest daughter. His reputation as a physician, as a gentleman of honor, and as a gentleman, was very high.

Cross-examined. I never had but one conversation with Dr. Ely on the subject referred to. I think it was in 1843, the day of his second marriage. What I have stated is my recollection of the conversation. I am not related to the family of Dr. Ely. I asked the question from curiosity, feeling an interest in the family and in this lady, who was an orphan.

ROBT. STEEL.

*Deposition of J. A. Philips.*

I am a member of the Philadelphia bar, have been so over twenty-five years.

I was slightly acquainted with Dr. Ezra Stiles Ely. I have known him personally not over fifteen years; by reputation all my lifetime.

His character and position in this community before he went out West were very high. He was pastor of the Third Presbyterian Church, and was beloved by his congregation. He was a man of influence in his denomination, and in the community at large.

I am unable to speak of his character as a practical man, except that he was a man who was appointed trustee and executor; a man in whom confidence was placed.

Having no knowledge of Dr. Ely personally until his return from

the West, I am unable to speak of his practicability as a man of business.

I did not know Samuel Carswell. I knew of his reputation. He was a man of high social position, and a man of wealth.

From professional matters which have come under my observation, should say he died wealthy.

I knew Dr. Samuel McClellan personally and by reputation. He was a son-in-law of Dr. Ely, a physician of standing in his profession, of good conduct and good repute in the community. He lived here a number of years. He was a man of entire respectability and of good conduct. I never heard any imputation to the contrary.

I have heard of a man named William Muldrow who lived in the West. I never saw him.

Question. From what you heard and know of this man, what was his character?

From what I have heard of him, I should say his character was that of a cheat or swindler. I have heard a client of mine in this city speak of having been swindled by him; one who had been a client at least.

Cross-examination declined.

J. A. PHILIPS.

*Deposition of Margaretta Lamb.*

I am the daughter of the late Margaret Carswell, and the widow of the late Lemmon Lamb. I reside in Philadelphia, 16th street and Locust streets.

My mother was not communicative in her business to strangers; when desiring advice on business affairs, she generally consulted her son, Capt. J. J. Robinson. She sometimes consulted me about her business affairs, but I had no special concern in it. I of course had an interest, but was not concerned particularly in it.

My residence in the month of May, 1843, was Girard Row, Chestnut street. That was the first time my mother had ever seen Mr. Patterson, or any of our family then living in Philadelphia. The first visit of Mr. Patterson to my house was of course in the daytime. I saw him on that visit. I could not remember how long the visit was. There were some individuals of the family present, but I can't recollect who. Mrs. Margaret Carswell. I do not remember whether she was present.

I rather think she was not from some little occurrences. I walked into the garden with Mr. Patterson. On that visit there was no

Question. On the occasion of that visit was there any allusion made to a mortgage, or deed of trust, or business affairs of any kind?

Answer. None whatever.

His next visit was an evening visit. Captain Robinson's daughter,

afterwards Mrs. Elliott, then Miss Mary Robinson, was present on that occasion, and I think one or two of my daughters. My mother, Mrs. Carswell, was present; Miss Margaret C. Lamb, afterwards Mrs. Pepper, and Miss Lucy Lamb.

The conversation at that time was of a desultory description. The conversation was general.

Question. During that whole visit was there anything said to any one present, or by any one present, in relation to a mortgage, or deed of trust, or any other matter of business?

Answer. I have no recollection of anything. My own impression is nothing was said.

If there had been I would certainly have been likely to have noticed it.

I have no recollection of any private conversation; it was a mere visit of courtesy.

I could not say how many visits there were after that; there were probably two or there. I have no 'recollection of any particular visit; they were mere visits of courtesy.

I could not positively say whether my mother saw him on all those visits.

That was the only evening he was at our house, and I do not think it probable that on any other visit all the members were present. It is not often when a gentleman pays a morning visit he finds all the ladies present.

I have no recollection of any allusion to business matters on those visits.

My mother was a woman of the greatest uprightness of character possible. She was truthful, a devoted Christian, very tenacious of truth, and extremely charitable.

Her granddaughter, Mary Ann Ely Carswell, lived with her from the time she was 2½ years old.

I knew the late Dr. Samuel McClellan very well. He was my family physician for 20 years. His family in 1843 consisted of his wife, himself, and I don't remember the number of children; the eldest was about 17 years old.

His wife at present is residing in New England.

His character was excellent in every respect, both as a gentleman and Christian.

My mother used often to talk to me of her Missouri affairs after her return in 1839. She owned a large quantity of land there.

Question. Did she ever speak to you, or did you ever hear her speak, about any power of attorney which she had given to Dr. Ely in relation to any trust or mortgage?

Answer. Never; I heard nothing about it. I know of her having executed a power of attorney to Dr. Ely to execute her private business in Missouri. I knew that Dr. McClellan had a large quantity of land in Missouri, and that Dr. Ely was his agent there.

I never heard Dr. McClellan speak of any power of attorney in relation to any trust or mortgage.

I knew Dr. Ely transacted Dr. McClellan's business in Missouri.

I knew William Muldrow. I saw him frequently. He stayed at Dr. Ely's when he first came to Philadelphia.

Dr. Ely was induced by the false representations and wild schemes of Mr. Muldrow (while he at the same time wore a garb of great sanctity, which he certainly did) to leave a large pastoral charge, where he was doing a great deal of good and exercising a happy influence, from the enjoyment of the highest social position and every domestic comfort and elegance, to remove to Missouri.

Dr. Ely there lost his own fortune, the greater portion of his wife's fortune, and much of that of his ward, Miss Carswell. As to losing the fortune of his ward, I am not so certain as about his own and his wife's. I was informed of that.

Dr. Ely had considerable property in 1838, not included in the deed of trust of January 5, 1838.

From the general character of William Muldrow for truth, would you believe him on his oath?

Answer. No, sir.

In saying I was not particularly interested in my mother's affairs, I meant I had no pecuniary interest.

Cross-examined by Mr. Biddle.

Mr. Patterson's visit was some time in May, 1843. There are certain circumstances by which I remember it. It was between my mother's removal from Dr. McClellan's in April to my house, and my niece's marriage from my house on the 20th of June.

My mother talked with me very freely about her business affairs. She lived with me till her death. I was her only daughter. My mother talked at all times about her business affairs, more particularly to me than to any one, except Captain Robinson; he was the principal person, but I think she talked over almost everything with me.

I knew that Dr. Ely had a row of buildings, in 1838, somewhere down 6th street. I heard him speak of it, and others speak of it, and believed it. I knew it as a family matter.

I don't know whether that property was incumbered. The property I speak of was not included in the deed of trust of January 5, 1838.

Re-examined.

On the occasion of that evening visit I have no recollection of Mrs. Patterson's being present, and I rather think not.

On any occasion when Mrs. Patterson was present I heard no

allusion, in conversation between Mr. James Patterson and Mrs. Carswell, to any deed of trust or mortgage.

MARGARETTA LAMB.

*Deposition of William Nassau, Sr.*

I reside at 934 N. 5th street, in the city of Philadelphia. I am almost 78 years old.

I knew the Rev. Dr. Ely, and know him still. I was an elder in Dr. Ely's session during all his ministry in his Pine Street church, from 1813 to 1836, till he left the church. He went to Missouri in 1835.

I had the fullest confidence in Dr. Ely. I was constantly engaged with him in the business of the church. I never doubted his principles as a religious, pious man. His word always seemed to be law with him. His word was as good as his bond.

The congregation of the 3d Presbyterian Church, Pine street, was attached to him unanimously. He was beloved by them.

I believe it was Mr. Muldrow who first exerted an influence over Dr. Ely to induce him to go to Missouri. The first visit Mr. Muldrow made to Philadelphia I met him in Dr. Ely's office in 2d street, in his house. Perhaps it was the latter part of the winter of 1835.

Dr. Ely introduced me to him. I had no further intercourse with Mr. Muldrow at that time.

My son-in-law, Dr. Handy, lived in Dover. When I called at Dr. Ely's office, Dr. Ely told me that Mr. Muldrow came on to see him, to make him a proposition to go out to the West to establish a theological and classical college there. Dr. Ely wanted my son to occupy the same position there that Dr. Hedge does in Princeton.

I went out to the western country in 1837. My son Charles went out with Dr. Ely in 1836.

I had personally very little intercourse with Mr. Muldrow. I am not certain that I saw him during all the time I was in Missouri. I think he was absent during the time I was there.

I have frequently heard Mr. Muldrow spoken of. The general expression of the public was that it was not favorable to Mr. Muldrow.

From my knowledge of the general character and reputation of William Muldrow, I certainly would not believe him on oath.

I knew Dr. Samuel McClellan in his lifetime. I was intimately acquainted with him. I knew him a long while, from the time he commenced practice here.

Dr. McClellan stood very high in this community, and in Pine street church. I never heard any insinuation against him.

I knew the late Margaret Carswell. I knew her well for many years, between 30 and 40 years. She stood very high; she was very amiable, quiet, friendly, and stood well as a member of the

church. I regarded her as a lady of piety, and of the highest character.

WILLIAM NASSAU, SR.

*Rev. John Greer's Deposition.*

I reside in Philadelphia at present. I am a chaplain in the U. S. Navy. My residence is No. 919 Market street.

I have been chaplain in the U. S. Navy since 1824, 35 years nearly.

I know the Rev'd Dr. Ely. I knew Dr. Ely from the time he settled here, I believe in 1814, to the time he left for Missouri, in 1835.

I did not know him in Missouri. Dr. Ely's character for piety, ability, and integrity stood very high at that time. He was a man of influence in the community, and of wealth.

I knew Dr. Samuel McClellan slightly, that is, personally: I know him well by reputation. His character for piety, integrity, professional and social worth, stood very high.

I never had any personal acquaintance with Mr. Muldrow. I have known him by reputation since 1846, about the month of May.

I went to Missouri at that time. I own lands in Marion county, in that State: a thousand acres.

William Muldrow's general character was not good.

Q. From your knowledge of his general character for truth and veracity, would you believe him on his oath?

A. No, sir.

I knew Mrs. Carswell by reputation. Her reputation for truthfulness, piety, integrity, and conscientiousness, was very high.

JOHN W. GREER.

*Deposition of Samuel Miles.*

I am a merchant in this city. I knew William Muldrow. I knew him by reputation in 1835. In 1836 I knew him personally. I then went to Missouri to reside. I first knew him personally in Marion county, Mo.

I crossed the plains to California in 1849. I resided in California about 5 years. I knew William Muldrow by reputation in California. I had no personal intercourse with him there. I heard him frequently spoken of in California. I knew him well by reputation in Missouri and California.

His reputation was notoriously bad in both places.

From your knowledge of his general character for truth and veracity in both places, would you believe him on oath?

A. No! I certainly would not.

Cross-examined by Mr. Biddle.

I reside in Abington, Montgomery Co. My place of business in this city, No. 1118 Market street.

I am the brother of the defendant in this suit.

Re-examined.

I have no pecuniary interest direct or indirect in the event of this suit.

SAMUEL MILES.

*Mary Jane Robinson's Deposition.*

I reside in Abington township, Montgomery county, ten miles from this city. I am the wife of Captain J. J. Robinson, and daughter-in-law of the late Margaret Carswell. I resided at my present residence in 1843.

Mrs. Carswell spent a portion of the summer of 1843 at my house. He arrived there about the middle of June, and remained till near the latter end of August.

During that summer I heard Mrs. Carswell occasionally speak of James H. Patterson. Her remarks were not of a flattering character. Mrs. Carswell gave me the impression that Mr. Patterson was an unworthy man in her estimation.

I have no doubt from these conversations of her entertaining a bad opinion of him. She gave me that impression. I always thought so. She did not want to have anything to do with him, was her meaning to me. She got out of patience when his name was mentioned. She didn't like to talk about him.

Mrs. Mary Elliott is dead. Margaretta C. Lamb, the late Mrs. Pepper, is dead.

Cross-examined by Mr. Biddle.

I am the sister of the defendant, Thomas J. Miles.

M. J. ROBINSON.

*Samuel Miles' Deposition.*

Q. Did you go from the western country to California in 1849?

A. Yes, sir; I arrived in California the latter part of the year.

I resided in the western country from the time I left Philadelphia in 1836, until I went to California in 1849, with the exception of one short visit to Philadelphia of about two months.

I have known William Muldrow personally and by reputation ever since 1835.

Q. Is it from this knowledge that you gave your testimony on the 19th inst.?

A. Yes, sir.

Cross-examination declined.

SAM'L MILES.

*Transcript of the Record of Southern* v. *Caldwell.*

State of Missouri, County of Marion.

Be it remembered, that heretofore, to wit, on the 28th day of January, A. D. 1858, there was filed in the office of the clerk of the Circuit Court in and for said county, a petition in civil action, in words and figures following, to wit:

*Petition.*

WALKER SOUTHERN, plaintiff,
*against*
WILLIAM D. CALDWELL, defendant.

In the Circuit Court of Marion County, Mo., vacation, before Feb. Term, 1858.

Plaintiff states that on or about the 9th day of February, 1850, the defendant made his certain promissory note in writing, hereto annexed, bearing date the day and year last aforesaid, and thereby promised to pay to Thomas H. Tatlow, on the first day of January, 1851, the sum of seven hundred and fifty dollars; and the said Thomas H. Tatlow afterwards, about the month of June, 1850, by his indorsement in writing on, assigned, and then and there delivered said promissory note to the plaintiff.

Plaintiff further says, that afterwards, on the 4th day of November, 1854, the defendant paid on said note the sum of three hundred and seven dollars and fifty cents, and that the remainder of the said sum of money in said promissory note specified and the interest are yet due and remaining unpaid, wherefore plaintiff asks judgment for said balance and interest.

JOHN D. L. DRYDEN,
Attorney for Plaintiff.

Walker Southan, the plaintiff, on oath says he believes the above petition and the matters therein, as stated, are true.

W. SOUTHAN.

Subscribed and sworn to before me, this 28th day of January, 1858.

THO. E. THOMPSON,
Clerk.

On the back of which petition appears the following indorsement:

*Petition.*

WALKER LOUTHAN
*v.*
W. D. CALDWELL.

The clerk will issue process.

DRYDEN,
For Plaintiff.

And afterwards, to wit, on the 28th day of January, A. D. 1858, there issued from the office of the clerk of the said Circuit Court a summons, in words and figures following, to wit:

*Summons.*

State of Missouri, County of Marion, *ss.*

The State of Missouri to the sheriff of Marion County, greeting:

We command you to summon William D. Caldwell, that he be and appear in our Circuit Court at the court-house in the city of Palmyra, within and for said county, on the 4th Monday in February next, then and there before the judge of our said court, to answer a petition exhibited in our said court against him by Walker Louthan, of which the accompanying writing is a copy, and this you shall in no wise omit.

Witness my hand, as clerk of our said court, and the seal [SEAL.] thereof. Done at office in Palmyra, at the county aforesaid, on the 28th day of January, 1858.

THOMAS E. THOMPSON,
Clerk.

*Service.*

On the back of said summons appears the following indorsement by the sheriff, in words and figures following, to wit:

Served the within writ, by leaving a copy of the writ, *togather* with a copy of petition attached thereto, at the residence of the within named William D. Caldwell, with a free white person, a member of the family, over the age of fifteen years. Done in Marion County, January 29th, 1858.

Fee $1 00.

B. M. HAWKINS,
Sheriff, Marion County.

*Leave to file Answer.*

And afterwards, to wit, on the 8th day of March, during the February term, 1858, of said Circuit Court, before the Hon. John

F. Redd, judge, the following, among other proceedings, were had, to wit:

WALKER LOUTHAN, plaintiff,
*v.*
WILLIAM D. CALDWELL, defendant.
} Cir. A. C. Suit on Note.

At this day come the parties herein by their attorneys, and on motion of defendant, he has leave to file his answer herein sixty days before the next term of this court, and this cause is continued until next term.

And afterwards, to wit, on the 22d day of June, 1838, before the July term of said Circuit Court, in vacation, before the clerk thereof, the following proceedings were had, to wit:

WALKER LOUTHAN, plaintiff,
*v.*
WILLIAM D. CALDWELL, defendant.
} Cir. A. C.

At this day come the parties herein, by their attorneys, and thereupon the defendant files his answer to the petition of plaintiff filed herein; which said answer is in words and figures following, to wit:

*Answer.*

Circuit Court, Marion County, Mo., 1858.

WALKER LOUTHAN, plaintiff,
*v.*
WILLIAM D. CALDWELL, defendant.

For answer to plaintiff's petition, defendant admits execution of note sued on, and assignment thereof to plaintiff by G. H. Tatlow, as stated by plaintiff; also admits payment of $307 50, as stated.

But defendant, for defence against the payment of the balance of said note, says that said note was executed to said Tatlow for and in consideration of the following lands, to wit:

The southeast quarter and the E. ½ of S. W. qr. sec. 16, T. 57, R. 6 west (except 40 acres taken off N. E. corner said S. E. qr., 113 rods in length E. and W., and 56 rods 23 poles in width N. and S.), and also 80 acres, part of the north ½ sec. 21, bounded as follows: beginning at N. E. corner sec. 21, running thence 240 poles west, thence 53⅓ *south poles*, thence 240 poles east, thence 53⅓ poles north, the beginning, in township 57, range 6 W., all lying in said county of Marion.

Which said lands said Tatlow did grant, bargain, sell, and convey to this defendant by deed of general warranty, dated 22d September, 1849. Defendant says that the payment aforesaid was made

for that portion of said lands lying in section No. 16, to which, so far as defendant is advised, there has as yet been set up no adverse claim. But defendant avers that for that portion of said land lying in section 21, one Thomas J. Miles instituted a suit against defendant in the Federal Court, United States, for the District of Missouri, held at St. Louis, and that at the October term said court, 1856, said Miles obtained a judgment and verdict at law against this defendant for the recovery of same, and for damages for detention thereof, the sum of five hundred and forty dollars, as well as other damages for supposed monthly value. That the remainder of said note is the sum agreed upon by defendant and said Tatlow as the prices of said portion of land in section 21, which in truth is the only and sole consideration of and for the balance of said note.

Defendant avers that by means of said judgment at law, in the Federal Court at St. Louis, the consideration for the said balance of said note has wholly failed, wherefore he is not legally liable to pay same; and having fully answered, prays to be dismissed with costs.

W. D. CALDWELL,
By his attorneys,
D. G. DAVENPORT,
H. S. LIPSCOMB.

W. D. Caldwell on oath says matters in above answer are true, as he believes.

W. D. CALDWELL.

Subscribed and sworn to before me this the 22d day of May, 1858.

THOS. E. THOMPSON,
Clerk.
By W. J. MEANS,
D. C.

On the back of which answer appears the following indorsement, to wit:

Filed June 22d, 1858.

THOS. E. THOMPSON,
Clerk.

*Continuance.*

And afterwards, to wit, on the 14th day of August, 1858, during the continuation of the July term, 1858, of said court, before the Honorable John T. Redd, judge, the following, among other proceedings, were had, to wit:

WALKER LOUTHAN, plaintiff,
*v.*
WILLIAM D. CALDWELL, defendant. } Cir. Co.

At this day come the parties herein, by their attorneys, and by

their consent, with assent of the court, this cause is continued until the next term of this court.

*Continuance.*

And afterwards, to wit, on the 4th day of March, 1859, it being during the February term, 1859, of said court, before the Hon. John T. Redd, judge, the following, among other proceedings, were had, to wit:

WALKER LOUTHAN, plaintiff,
*v.*
WILLIAM D. CALDWELL, defendant. } Cir. A. C.

At this day come the parties herein, by their attorneys, and by consent this cause is continued until next term of this court.

*Continuance.*

And afterwards, to wit, on the 27th day of July, 1859, it being during the July term, 1859, of said court, before the Honorable T. Redd, judge, the following, among other proceedings, were had, to wit:

WALKER LOUTHAN, plaintiff,
*v.*
WILLIAM D. CALDWELL, defendant. } Cir. A. C.

At this day come the parties herein, by their attorneys, and by consent this cause is continued until next term of this court.

*Continuance.*

And afterwards, to wit, on the 7th of March, 1860, during the continuance of the February term, 1860, of said court, before the Hon. John T. Red, judge, the following, among other proceedings, were had, to wit:

WALKER LOUTHAN, plaintiff,
*v.*
WILLIAM D. CALDWELL, defendant. } Cir. A. C.

At this day come the parties herein, by their attorneys, and by consent this cause is continued until next term of this court.

State of Missouri, County of Marion, *ss.*

I, James W. Brady, clerk of the Circuit Court, in and for said county, do certify that the above and foregoing is a true and correct copy of the record of said court in the cause therein specified, as

fully and completely as the same appears of record and on file in the office of said court, and that there are no original papers filed that do not form a part of the record thereof.

Witness my hand as clerk, and the seal of said court. Done at office at Palmyra, in said county, this 18th day of April, A. D. 1860.

[L. S.]

J. W. BRADY,
Clerk.

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| Marion C. C., | 25 |
| Paid, | $3 00 |

*Mortgage Deed—Ely to Carswell.*

Know all men by these presents, that I, Ezra Stiles Ely, D.D., of the county of Marion, in the State of Missouri, having executed several declarations of trust, and among the rest one bearing date on the 22d of November, A. D. 1837, intended to be recorded in Ralls County, in said State, and having been advised by counsel learned in the law, that *that* said declarations or deeds of trust are null and void in law, do now (in consideration of the premises, and because I, the subscriber, am indebted to Margaret Carswell, widow, of the aforesaid county and State, in the sum of ten thousand dollars, secured to be paid to her by three bonds, given under my hand and seal) bargain, sell, and transfer to the said Margaret Carswell, her heirs and assigns, forever, all my right and title in and to the following described pieces of property, or portions of estate, viz.:

The east half of the northwest quarter of section No. 10, in township No. fifty-six, north of the base line, in range No. 6 west of the 5th principal meridian, except ten acres of the same which I have covenanted to convey on certain terms to William Gerrard; the northwest quarter of the northeast quarter of section No. ten, township No. 56, north in range No. 6 west; the east half of the southwest quarter of section No. 8, in township No. 56 north, in range No. 6 west; all that certain lot of ground known as the west half of the southeast quarter of section No. 23, in township No. 56 north, in range No. 6 west, of the 5th principal meridian, together with those two log and two frame houses thereon erected, with all the appurtenances of the same; all the right, title and interest of the subscriber in and to a certain steam saw and grist mill, known as the

their consent, with assent of the court, this cause is continued until the next term of this court.

*Continuance.*

And afterwards, to wit, on the 4th day of March, 1859, it being during the February term, 1859, of said court, before the Hon. John T. Redd, judge, the following, among other proceedings, were had, to wit:

WALKER LOUTHAN, plaintiff,
*v.*
WILLIAM D. CALDWELL, defendant. } Cir. A. C.

At this day come the parties herein, by their attorneys, and by consent this cause is continued until next term of this court.

*Continuance.*

And afterwards, to wit, on the 27th day of July, 1859, it being during the July term, 1859, of said court, before the Honorable T. Redd, judge, the following, among other proceedings, were had, to wit:

WALKER LOUTHAN, plaintiff,
*v.*
WILLIAM D. CALDWELL, defendant. } Cir. A. C.

At this day come the parties herein, by their attorneys, and by consent this cause is continued until next term of this court.

*Continuance.*

And afterwards, to wit, on the 7th of March, 1860, during the continuance of the February term, 1860, of said court, before the Hon. John T. Red, judge, the following, among other proceedings, were had, to wit:

WALKER LOUTHAN, plaintiff,
*v.*
WILLIAM D. CALDWELL, defendant. } Cir. A. C.

At this day come the parties herein, by their attorneys, and by consent this cause is continued until next term of this court.

State of Missouri, County of Marion, *ss.*

I, James W. Brady, clerk of the Circuit Court, in and for said county, do certify that the above and foregoing is a true and correct copy of the record of said court in the cause therein specified, as

fully and completely as the same appears of record and on file in the office of said court, and that there are no original papers filed that do not form a part of the record thereof.

Witness my hand as clerk, and the seal of said court. Done at office at Palmyra, in said county, this 18th day of April, A. D. 1860.

[L. S.]

J. W. BRADY,
Clerk.

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*Mortgage Deed—Ely to Carswell.*

Know all men by these presents, that I, Ezra Stiles Ely, D.D., of the county of Marion, in the State of Missouri, having executed several declarations of trust, and among the rest one bearing date on the 22d of November, A. D. 1837, intended to be recorded in Ralls County, in said State, and having been advised by counsel learned in the law, that *that* said declarations or deeds of trust are null and void in law, do now (in consideration of the premises, and because I, the subscriber, am indebted to Margaret Carswell, widow, of the aforesaid county and State, in the sum of ten thousand dollars, secured to be paid to her by three bonds, given under my hand and seal) bargain, sell, and transfer to the said Margaret Carswell, her heirs and assigns, forever, all my right and title in and to the following described pieces of property, or portions of estate, viz.:

The east half of the northwest quarter of section No. 10, in township No. fifty-six, north of the base line, in range No. 6 west of the 5th principal meridian, except ten acres of the same which I have covenanted to convey on certain terms to William Gerrard; the northwest quarter of the northeast quarter of section No. ten, township No. 56, north in range No. 6 west; the east half of the southwest quarter of section No. 8, in township No. 56 north, in range No. 6 west; all that certain lot of ground known as the west half of the southeast quarter of section No. 23, in township No. 56 north, in range No. 6 west, of the 5th principal meridian, together with those two log and two frame houses thereon erected, with all the appurtenances of the same; all the right, title and interest of the subscriber in and to a certain steam saw and grist mill, known as the

"Ely McKee Mill," and situate in Ralls county, and to an equal undivided half of the lot of land as well as of the mill itself whereon the mill stands, which lot of land is known as the northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter of section No. 26, in township No. 56, north, in range No. 6 west, being composed of two smaller lots of 40 acres each, purchased of Norton & Hall, an equal undivided fifth part in that tract of land in Ralls county, known as the east half of the southeast quarter of section No. 26; the east half of the northeast quarter of section No. 35 (thirty-five). The west half of the northwest quarter of section No. 36, and the west half of the southwest quarter of section No. 25, in township No. 56 north, in range No. 6 west; which fifth part of said 320 acres, and the buildings thereon erected was sold to the subscriber by Moses D. Bates and wife; the southeast quarter of section No. 28, in township No. 56 north, in range No. 7 west, bought of William Dulaney and others, and in relation to which, the subscriber has granted, on certain term, a right of pre-emption to Joseph M. Hampton, and that tract of 80 acres of land known as the southeast quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section No. 31, in township No. 56 north, in range No. 6 west; which tract was bought of Franklin Bowles, and in relation to which the subscriber has granted a pre-emption right to James Boggs, who has paid one hundred dollars towards the purchase of said tract; that she, the said Margaret Carswell, her heirs and assigns, may forever have, hold, and possess the herein granted premises; nevertheless, the conditions of this bargain and sale are such, that if the said Ezra Stiles Ely shall well and truly pay to the said Margaret Carswell, her heirs and assigns, the principal and interest of the above described bonds, on or before the expiration of five years from the date hereof, then this deed of mortgage shall be and forever continue null and void, otherwise it shall be and remain in full force. In witness whereof, I have hereunto set my hand and seal, this eighth day of December, A.D. 1837.

EZRA STILES ELY. [SEAL.]

Signed, sealed and delivered,
in the presence of us.

GEO. SCHROTER,
JOHN R. MCMILLAN,
MATTHEW HASTINGS.

State of Missouri, County of Marion, *ss.*

Be it remembered, that on the 5th day of January, A.D. 1838, before me, Stanton Buckner, clerk of the Circuit Court within and for Marion county, Missouri, personally came Ezra Stiles Ely, known to me, to be the person whose name is subscribed to the foregoing instrument of writing as having executed the same, and ac-

knowledged the same to be his act and deed, hand and seal, for the purposes therein mentioned.

Witness my hand and the seal of our said court. Done at office in Palmyra, at the county aforesaid, on this 5th day of January, A.D. 1838.

STANTON BUCKNER,
Clerk.

The blotting of the word "the" appears as above in the original.
Recorded the sixteenth day of January, A.D. 1838.

HARRISON GLASCOCK,
Ex. Recorder R. C.

Examined.

State of Missouri, County of Ralls, *ss.*

In the Recorder's office.

I, Samuel K. Caldwell, recorder within and for said county of Ralls, do hereby certify that the annexed and foregoing contains a true and perfect copy of the record of a deed of mortgage from Ezra Stiles Ely to Margaret Carswell, with the certificate of acknowledgment thereof as full, correct, and complete, as the same are now remaining of record in my said office, in deed record book C., at pages 371 and 372.

[SEAL.] Witness my hand and the seal of my said office, done at New London, in said county of Ralls, this 10th day of October, 1851.

SAMUEL K. CALDWELL,
Recorder.

*Record in U. S. C. C. of Miles* v. *Caldwell.*

Missouri District, *sct.*

THOMAS J. MILES, plaintiff, *agt.* WILLIAM D. CALDWELL, defendant.

Be it remembered, that on the twelfth day of September, in the year of our Lord one thousand eight hundred and fifty-five, come the plaintiff by his attorney, and filed in the office of the clerk of the Circuit Court of the United States, for Missouri district, his declaration against the defendant, in the words and figures following, to wit:

*Declaration in Ejectment.*

United States of America, District of Missouri, in the Circuit Court of the United States, for the District of Missouri, October Term, 1855.

Thomas J. Miles, who is a citizen of the State of Pennsylvania, complains of William D. Caldwell, who is a citizen of the State of Missouri, of a plea of trespass and ejectment. For that the said plaintiff heretofore, to wit, on the 1st day of October, in the year eighteen hundred and fifty (1850), at the district aforesaid, was legally entitled to the possession of the following parcels of land in the county of Marion, in the State of Missouri; that is to say, the northeast quarter of the northwest quarter section 21, in township 57 north, of range six west (N. E. of N.W. 21, T. 57, N. R. 6 W), and the north half of the northeast quarter of section 21 in township fifty-seven, north of range 6 west (N. ½ of N. E. 21 T. 57, N. 6 W), which two parcels make one connected tract of land, and said plaintiff being so entitled to the possession thereof, the said defendant afterwards, to wit, on the day and year aforesaid, at the district aforesaid, with force and arms, unlawfully entered into and upon the said land, and therefrom ejected the said plaintiff, and still withholds from the said plaintiff the possession thereof, to the damage of the plaintiff in the sum of twenty-five hundred dollars. Wherefore, he sues and asks judgment, for the possession of said land and damages as aforesaid, for the withholding of the possession thereof and costs.

THOS. T. GANNT,
P. Q.

And on said declaration was issued a summons as follows, on the 12th September, 1855:

*Summons.*

Missouri District, *sct.* The President of the United States to the Marshal of the Missouri District, greeting:

You are hereby commanded to summon William D. Caldwell, a citizen of the State of Missouri, that he be and appear before the honorable Circuit Court of the United States, for the District of Missouri, on the first day of the next term thereof, to be holden at the city of Saint Louis, in and for said district, on the first Monday of October next, then and there to answer unto Thomas J. Miles, a citizen of the State of Pennsylvania, in a plea of trespass and ejectment, to the damage of said plaintiff twenty-five hundred dollars. Hereof fail not, and have you then there this writ.

Witness, the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, the 12th day of Sep-

tember, A.D. eighteen hundred and fifty-five. Issued at [SEAL.] office in the city of Saint Louis, under the seal of said court, the day and year last aforesaid.

BEN. F. HICKMAN,
Clerk.

*Marshal's Return of Service.*

And said writ is indorsed a return as follows:

I hereby certify, that I served the within writ on William D. Caldwell, by reading the same, together with the copy of the declaration thereto annexed, to him and within his hearing at Marion County, Missouri, September 17th, 1855.

THOMAS S. BRYANT,
U. S. Marshal Mo. District.
By GEO. W. WELLER,
Deputy Marshal.

And afterwards, viz., at the October term of our said court, for the year 1855, on Thursday, the 4th day of October, 1855, was had the following proceedings:

*Plea Filed.*

THOMAS J. MILES, plaintiff,
*against*
WILLIAM D. CALDWELL, defendant. } Ejectment.

This day comes the defendant by his attorney, and files herein his plea of not guilty.

And said plea is in the words and figures following, to wit:

THOMAS J. MILES, plaintiff,
*against*
WILLIAM D. CALDWELL, defendant.

In Circuit Court of the United States, District of Missouri.

*Plea.*

And now at this day comes the defendant, by Thomas L. Anderson, his attorney, and says the plaintiff his action against him ought not to have and maintain, because he says that he is not guilty of the supposed trespass in ejectment, in manner and form as the plaintiff in his declaration hath alleged, and of this he puts himself upon the country.

THOS. L. ANDERSON,
For Defendant.

And afterwards, viz., at the October term of our said court, for the year 1856, on Tuesday, the 21st day of October, 1856.

*Jury sworn.*

THOMAS J. MILES, plaintiff,
*against*
WILLIAM D. CALDWELL, defendant. } Ejectment.

This day come the parties by their attorneys, and this case being called for trial, and both parties being ready, it is ordered that a jury come, and thereupon come said jury as follows: Albert G. Blakey, R. S. Briscoe, John Smedley, D. C. Howitt, H. L. Freary, S. D. Patterson, A. Morris, A. Swartzgott, McDaniel Dorris, Andrew Christy, Alton Long, and John Hogan, twelve good and lawful men, who were elected, tried and sworn, well and truly to try the issue joined between the parties in this case, and the evidence was in part heard, but not being concluded at the hour of adjournment, further proceedings herein are continued until to-morrow morning.

And afterwards, Wednesday, October 22d, 1856, was had the following proceedings:

*Hearing.*

THOMAS J. MILES, plaintiff,
*against*
WILLIAM D. CALDWELL, defendant. } Ejectment.

This day come again the parties by their attorneys, and also the jury sworn herein, and further progress was made in the trial of this cause, but not being concluded at the hour of adjournment, further proceedings are continued until to-morrow morning.

*Hearing.*

And afterwards, Thursday, October 23d, '56, was had the following proceeding:

THOMAS J. MILES, plaintiff,
*agst.*
WILLIAM D. CALDWELL, defendant. } Ejectment.

This day come again the parties by their attorneys, and also the jury sworn herein, and further progress was made in the trial of this case, but not being concluded at the hour of adjournment, further proceedings are continued until to-morrow morning.

*Hearing.*

And afterwards, Friday, October 24th, '56, was had the following proceeding:

THOMAS J. MILES, plaintiff,
*against*
WILLIAM D. CALDWELL, defendant. } Ejectment.

This day come again the parties by their attorneys, and the jury sworn herein being present, further progress was made in the trial of this case, but not being concluded at the hour of adjournment, further proceedings are continued until to-morrow morning.

*Hearing.*

And afterwards, Saturday, October 26th, '56, was had the following proceeding:

THOMAS J. MILES, plaintiff,
*against*
WILLIAM D. CALDWELL, defendant. } Ejectment.

This day come again the parties by their attorneys, and the jury sworn herein being present, further progress was made in the trial of this cause, but not being concluded at the hour of adjournment, further proceedings are continued until Monday morning next.

*Hearing.*

And afterwards, Monday, Oct. 27th, '56, was had the following proceeding:

THOMAS J. MILES, plaintiff,
*against*
WILLIAM D. CALDWELL, defendant. } Ejectment.

This day come again the parties by their attorneys, and the jury sworn herein being present, the evidence and the argument of counsel progressed and was concluded, and the jury retired to their room to consult of their verdict.

*Verdict of Jury.*

And afterward, on Tuesday, the 28th October, 1856, was had the following proceeding:

THOMAS J. MILES, plaintiff,
*against*
WILLIAM D. CALDWELL, defendant. } Ejectment.

This day come again the parties by their attorneys, and the jury sworn herein being all present, returned into court the following verdict: "We, of the jury, find from the evidence that the defendant is guilty of the trespass and ejectment in the declaration mentioned, as to the following tract of land, parcel of that in the decla-

ration described, to wit: beginning at the northeast corner of northeast quarter of section twenty-one, in township 57 north, of range 6 west, and running thence westwardly two hundred and forty poles, thence southwardly fifty-three and ½ poles, thence eastwardly two hundred and forty poles, and thence to the beginning, containing eighty acres, and assess the damages at the sum of five hundred and forty dollars, and find the monthly value of said premises to be eight dollars; and as to the remainder of the land in the declaration described, we find the defendant not guilty.

ALTON LONG,
Foreman."

*Judgment.*

It is therefore now considered by the court, that the said plaintiff, Thomas J. Miles, recover against the defendant, William D. Caldwell, the portion or parcel of land as described by the jury in their verdict rendered herein by them; and it is further considered by the court that the said plaintiff recover of the defendant the damages and monthly damages by said jury assessed, and also his costs in this suit expended, and that execution issue therefor, and that the plaintiff have his writ of possession against said defendant for the portion or parcel of land so adjudged in his favor.

*Motion for New Trial made.*

And afterward, at the same (October, 1856) term of said court, on Thursday, Oct. 30th, 1856, was had the following proceeding:

THOMAS J. MILES, plaintiff,
*against*
WILLIAM D. CALDWELL, defendant. } Ejectment.

This day come the defendant, by his attorney, and filed herein his motion to set aside the verdict of the jury and the judgment rendered herein, and to grant him a new trial, upon the grounds and for the reasons set forth in said motion.

*Motion.*

And said motion is in words and figures as follows:

THOMAS J. MILES, plaintiff,
*against*
WILLIAM D. CALDWELL, defendant.

In Circuit Court, District of Missouri.

The defendant, by Glover and Richardson, moves the court to set aside the verdict of this cause, grant him a new trial, for the follow-

ing reasons: 1st. The court refused a proper instruction, moved by the defendant to be given to the jury. 2d. The verdict of the jury is against the evidence in the cause, and in relation to the satisfaction of the mortgage to Gallaher is without any evidence to support it, and the damages allowed are enormous, and wholly against evidence.

3d. The jury disregarded the evidence in finding that the deed to Carswell and McClellan, dated January 5th, 1838, was not fraudulent.

4th. The court erred in not deciding said deed of January 5th, 1838, fraudulent and void on its face.

GLOVER & RICHARDSON,
For Deft.

*Motion Overruled.*

And afterward, at the same (Oct., 1856) term of said court, on Saturday, the 15th day of November, 1856, was had the following proceeding:

THOMAS J. MILES, plaintiff,
*against*
WILLIAM D. CALDWELL, defendant. } Ejectment.

This day come the parties by their attorneys, and the court having heard and being now fully advised of and concerning the motion to set aside the verdict and grant a new trial herein, doth now order that the said motion be, and the same is hereby overruled.

Missouri District, *sct.*

I, Benjamin F. Hickman, clerk of the Circuit Court of the United States for Missouri District, do certify that the foregoing is a correct and complete transcript of the record and proceedings of our said court in a case therein decided, wherein Thomas J. Miles was plaintiff, and William D. Caldwell was defendant, as fully as the same now remain on file and of record in my said office.

In testimony whereof, I hereunto subscribe my name, at office, in the city of Saint Louis, this 22d day of December, in the year of our Lord one thousand eight hundred and fifty-six.

BEN. F. HICKMAN.

*Instructions for Plaintiff.*

The following is a copy of the instructions given in the suit at law of Thomas J. Miles against William D. Caldwell, on behalf of plaintiff:

Although Dr. Ely, in making the deed dated January 5th, 1838, may have been quickened by the steps taken by some of his other

creditors to whom he wished to prefer his ward, yet that circumstance alone does not render his deed void or voidable in law, provided he owed the debts which that deed was executed to secure, and the value of the property conveyed was not unnecessarily large to secure those debts, if the deed was, presently after its execution, placed upon record in Marion County, or delivered to the grantees, Carswell and McClellan.

The jury is instructed that the deed read in evidence, from James Gallaher to James H. Patterson, is no evidence of title in James H. Patterson and those claiming under him, if the mortgage debt from Ely to Gallaher was before, or at the time of the said deed, paid and discharged by Ely, or with money furnished by Ely for that purpose.

If the jury believe, from the evidence, that the money paid to James Gallaher by James H. Patterson, on the 31st October, 1846, was furnished for that purpose by Ezra Stiles Ely, they will regard the mortgage from Ely to Gallaher as paid and satisfied.

If the jury find as indicated in the preceding instruction, they will find for the plaintiff, unless they find from the evidence that the object of Ezra Stiles Ely, in making the deed of mortgage of January 5, 1838, was to defraud his creditors.

Fraud is never to be presumed by a jury. The party assailing a deed on the ground of fraud, must establish it by evidence to the satisfaction of the jury.

*Instructions for Defendant.*

On behalf of Defendant.

That if the jury find, from the evidence in the cause, that at the time of the execution of said deed to Carswell and McClellan, of January 5th, 1838, much more property was embraced therein than was necessary, at its then reasonably estimated value, to secure the debts mentioned therein, and at the same time the said Ely was indebted to other persons, and altogether was indebted more than he was able to pay; that such embracing of more property than was so reasonably required may be considered by the jury, with the other facts and circumstances of the case, in determining whether said deed was fraudulent as against creditors *and of and* purchasers from said Ely.

That the conveyance of goods and chattels of a perishable nature, or consumable in the using, by way of mortgage or other security for the payment of a debt, when, by the terms of the conveyance, such goods and chattels must, of necessity, be consumed or perish before the debt is to be paid, and the possession of such goods and chattels is suffered to remain with the grantor, such facts are evidence that such conveyance was made by and between the parties thereto with

intent to hinder, delay, and defraud the creditors of the grantor, or any purchaser or purchasers from him for value.

That when a deed is made conveying property to secure an existing debt or debts, and, by the terms of the conveyance, much more time is given for the payment of the debt or debts than is usually necessary to collect such debt or debts by due course of law, that fact may be considered by the jury, with the other facts and circumstances of the case, in determining whether such deed is fraudulent as to creditors of and purchasers from such grantor for value.

That if the jury find, from the evidence in the cause, that, at the time of the execution of said deed to Carswell and McClellan of Jan. 5th, 1838, by Ely, much more property was embraced therein than was necessary, at its then reasonably estimated value, to secure the debts mentioned therein, and, at the same time, the said Ely was indebted to other persons, and altogether was indebted more than he was able to pay; that such embracing of more property than was so reasonably required may be considered by the jury, with the other facts and circumstances of the case, in determining whether such deed was fraudulent as against creditors of and purchasers from said Ely.

The jury are instructed that the deed made by said Ely to Carswell and McClellan, dated November 22d, 1837, and recorded December 5th, 1837, and read in evidence by the defendant, appears on its face to have been made with intent to hinder, delay, and defraud creditors, and may be used by the jury as furnishing a clue to the motives which induced the making of the deed of January 5th, 1838, providing the making thereof was known to said Carswell and McClellan, was accepted by them, or consented to by them. If the jury find, from the evidence in the cause, that, at the time of making said deed of Jan. 5, 1838, by Ely to Carswell and McClellan, said Ely was indebted to other persons, besides those named in said deed, and altogether more than he was able to pay, and that said deed was made by and between the parties thereto with intent to secure the debts therein named, and with the intent that said Ely might dispose of portions of the property conveyed thereby in his discretion to the payment of his debts, so far as he saw fit, and with the intent to prevent the sacrifice of his property under execution, and with the intent that said Ely should exercise authority over and control the property mentioned herein as he chose to do, and he was permitted to remain in possession, and use said property, they ought to find that the said deed is fraudulent, null, and void, as to creditors of said Ely, and any purchaser or purchasers for value from him; and such intents may be shown by the admissions or conduct of the grantees.

The court having declared the sheriff's deed to Gallaher void, the jury are instructed that nothing should be credited on the judgment of May 5, 1841, on account of the bid made on the sale mentioned

in said sheriff's deed; and they are also instructed that if, after deducting said bid from the credits which had been made on said judgment prior to the 31st day of October, 1846, there remained any part of said judgment unpaid to the said Gallaher; and they also find that, on the day last mentioned, and while a portion of said judgment so remained unpaid, the said Patterson, with the written consent of said Ely, paid to said Gallaher such balance then remaining due on the mortgage from Ely to Gallaher, or more than was so due, and in consideration thereof took to himself from said Gallaher, who was then in lawful possession thereof, the quitclaim deed read in evidence, conveying to said Patterson the said mortgaged premises, and said Patterson sold to Tatlow and put him in possession; and that at the commencement of this suit the defendant was in possession of the part of said premises sued for, claiming under said deed from Gallaher to Patterson; then the plaintiff is not entitled to recover in this suit, unless prior to the commencement thereof the plaintiff, or some one under whom he claims, had paid to Patterson, or some one claiming under him, the amount due on said mortgage on the 31st October, 1846, with interest thereon, and that plaintiff in this action has no right apply any rents accruing from the land in dispute to the said debt or interest.

United States of America, District of Missouri, *sct.*

I, Benjamin F. Hickman, clerk of the Circuit Court of the United States for the districts of Missouri, certify the foregoing to be a true and complete copy of the pleadings and proceedings in a certain cause in said court determined, wherein William D. Caldwell was complainant, and Thomas J. Miles defendant, as fully as the same remain on file and of record in my office, and of the exhibits and papers agreed upon by solicitors for parties to be copied with said record for Supreme Court of the United States.

In witness whereof, I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, this 4th day of October, A.D. eighteen hundred and sixty.

[SEAL.]

BEN. F. HICKMAN,
Clerk.

See agreement on page 306 of solicitors, as to two records used in the hearing of this cause, but not now on file.

In the United States Circuit Court for Missouri, in Chancery. April Term, 1860.

WILLIAM D. CALDWELL
*v.*
THOMAS J. MILES.

It is agreed by the parties to the above entitled cause that the two transcripts referred to in the answer of defendant Miles, and read at the hearing, one of them being of the case of Sharswood and al. *v.* McClellan and al., from the Court of Common Pleas for the City and County of Philadelphia, Pennsylvania, and the other being of the Orphans' Court for said State and county, in the matter of the estate of Samuel Carswell, deceased, may be annexed to the record without being actually copied thereunto, for the purpose of review on appeal by the Supreme Court of the United States. And that the same, so annexed, shall be regarded in all respects as part of the record, in the same manner as if actually copied thereinto.

S. T. GLOVER,
For Caldwell.
THOS. T. GANTT,
For Miles.

It was also admitted at the trial that the value of the property in controversy exceeded two thousand dollars ($2000).

SAML. T. GLOVER,
Sol. for Caldwell.
THOS. T. GANTT,
For Th. J. Miles.

Among the records of the Orphans' Court for the City and County of Philadelphia, amongst other things, it is thus contained. Estate of Samuel Carswell, deceased. Sur account of Ezra Stiles Ely, executor and trustee (by will) of Mary Ann Ely Miles.

April 29th, 1850.

*Account of E. S. Ely.*

Mary Ann Ely Carswell (now Mrs. Miles), issue of S. K. Carswell, in account with E. S. Ely, Executor and Trustee by Will of S. Carswell.

Dr.

| | | | | |
|---|---|---|---|---|
| 1829. | | | | |
| Nov. | 25. | To cash paid her mother, Elizabeth Carswell, for her support, . . . | $200 | |
| | | " interest on the above to May 1st, 1844, 14 yrs., 5 mos., and 6 days, . . | 173 | 20 |
| Dec. | 16. | " cash paid her mother, E. Carswell, . | 50 | |
| | | " interest on above sum for 14, 4, 15, . | 43 | 12 |

| | | | |
|---|---|---|---|
| 1830. | | | |
| Jany. 16. | To cash paid her mother, . . . . | 59 | |
| | " interest on above sum for 14, 3, 15, . | 50 | 60 |
| Feby. 16. | " cash paid her mother, . . . . | 53 | 25 |
| | " interest on above for 14, 2, 15, . . | 45 | 33 |
| March 16. | " cash paid her mother, . . . . | 50 | |
| | " int. on above for 14, 1, 15, . . . | 42 | 37 |
| Apl. 19. | " cash paid her mother, . . . . | 50 | |
| | " int. for 14, 0, 2, . . . . . | 42 | 10 |
| May 17. | " cash paid her mother, . . . . | 50 | 00 |
| | " int. on above for 13, 11, 14, . . | 41 | 86 |
| June 16. | " cash paid her mother, . . . . | 50 | |
| | " int. on above for 13, 10, 15, . . | 41 | 62 |
| July 17. | " cash paid her mother, . . . . | 100 | 00 |
| | " int. on above for 13, 9, 14, . . . | 82 | 74 |
| Nov. 6. | " cash paid Dr. T. D. Mitchell, for attendance on her, . . . . . | 17 | |
| | " int. on above for 13, 5, 25, . . . | 13 | 76 |
| 1831. | | | |
| March 1. | " cash paid her grandmother, Margaret Carswell, for her support, . . | 195 | 00 |
| | " int. on above for 13, 2, 0, . . . | 154 | 05 |
| | | 1,605 | 00 |
| 1831. | | $1,605 | 00 |
| July 5. | " cash paid her grandmother for her support, &c., . . . . . | 118 | 13 |
| | " int. on above for 12, 9, 25, . . . | 90 | 76 |
| Sept. 30. | " J. W. Thompson, Esq., tr., for her rent of pew, . . . . . | 3 | 15 |
| | " int. on above for 12, 7, 1, . . . | 2 | 26 |
| Dec. 31. | " cash paid her grandmother for support, | 167 | 69 |
| | " int. on above for 12, 4, 1, . . . | 124 | 11 |
| 1832. | | | |
| Dec. 31. | " cash paid her grandmother, as per receipt dated Feb. 7, 1833, . . . | 373 | 68 |
| | " int. on above for 11, 4, 1, . . . | 254 | 15 |
| 1833. | | | |
| Feby. 14. | " cash paid R. Miles, her State tax, . | 30 | 00 |
| | " int. on above for 11, 2, 17, . . . | 20 | 18 |
| Dec. 17. | " J. W. Thompson, tr. of Third Presbyterian Church, . . . . . | 14 | 85 |
| | " int on above for 10, 4, 24, . . . | 9 | 26 |
| Dec. 31. | " cash paid her grandmother for her support, per rec't July 23, 1834, . . | 415 | 31 |
| | " int. on above for 10, 4, 01, . . . | 257 | 47 |

| | | | | |
|---|---|---|---|---|
| 1834. | | | | |
| Apl. | 16. | To cash paid E. J. Yard, her State for 1833, | 30 | |
| | | " int. on above for 10, 0, 15, . . . | 18 | 17 |
| Dec. | 31. | " John Miles, her State tax for 1834, . | 30 | |
| | | " int. on above 9, 4, 1, . . . . | 16 | 80 |
| 1835. | | | | |
| Jany. | 8. | " cash paid her grandmother for her support, . . . . . | 393 | 38 |
| | | " int. on above for 9, 3, 23, . . . | 219 | 82 |
| Dec. | 28. | " cash paid her grandmother for her support, . . . . . | 438 | 40 |
| | | " int. on above for 8, 4, 3, . . . | 219 | 38 |
| 1837. | | | | |
| Jany. | 31. | " cash paid her grandmother for her support, . . . . . | 388 | 63 |
| | | " int. on above for 7, 3, 1, . . . | 169 | 08 |
| Dec. | | " for 11 Marion City lots, as per deed, . | 2,200 | |
| | | | 7,609 | 66 |
| | | | 7,609 | 66 |
| | | " int. on above for 6, 4, 18, . . . | 842 | 60 |
| Dec. | 31. | " cash paid her grandmother for her support, . . . . . | 450 | |
| | | " int. on above for 6, 4, 1, . . . | 171 | 08 |
| 1839. | | | | |
| March | 29. | " her grandmother for her support, . . | 556 | 51 |
| | | " int. on above for 5, 1, 9, . . . | 170 | 65 |
| Nov. | 6. | " her pew rent, by Dr. S. McClellan, . | 7 | 87 |
| | | " int. on above for 4, 5, 25, . . . | 2 | 10 |
| 1840. | | | | |
| Jany. | 7. | " Dr. S. McClellan, for support, . . | 350 | 38 |
| | | " int. on above for 4, 3, 24, . . . | 90 | 73 |
| Nov. | 20. | " by Dr. McClellan, for, . . . . | 446 | 69 |
| | | " int. on above 3, 5, 11, . . . | 92 | 39 |
| 1841. | | | | |
| Nov. | 22. | " paid as above, . . . . . | 400 | |
| | | " int. on above 2, 5, 9, . . . . | 58 | 60 |
| 1842. | | | | |
| Jany. | 4. | " cash paid as above, . . . . | 129 | 13 |
| | | " int. on above for 2, 3, 27, . . . | 17 | 99 |
| Nov. | 24. | " cash paid as above, . . . . | 300 | |
| | | " int. on above 1, 5, 7, . . . . | 25 | 85 |
| 1843. | | | | |
| Jany. | 2. | " cash paid as above, . . . . | 55 | 46 |
| | | " int. on above for 1, 3, 29, . . . | 4 | 42 |
| May | 4. | " cash paid as above, . . . . | 420 | |
| | | " int. on above for 0, 11, 27, . . . | 24 | 99 |

| | | | | |
|---|---|---|---|---|
| July | 19. | To cash paid as above, | 100 | |
| | | " int. on above for 0, 9, 12, | | 4 70 |
| Sep. | 30. | " cash paid as above, | 100 | |
| | | " int. on above for 0, 7, 1, | | 3 51 |
| Nov. | 28. | " cash paid her grandmother by Dr. McClellan, | 180 | 50 |
| | | " int. on above for 0, 5, 3, | | 4 60 |
| Nov. | 28. | " her trustees by Dr. McClellan, | 1,000 | |
| | | int. on above for 0, 5, 3, | | 25 50 |
| 1844. | | | | |
| Jan'y | 8. | " her trustees, | 250 | |
| | | " int. on above for 0, 3, 23, | | 4 70 |
| | | | 13,900 | 61 |
| 1844. | | Amt. forward, | 13,900 | 61 |
| May | 1. | " 44 shares Jeff. Medical College stock, paid her trustees at par of $500 each share, | 22,000 | |
| | | " 5½ mos. interest accumulated on same, | 605 | |
| | | " 5 per cent. commissions on the principal and income of her estate to this day, say on $64,307 09, | 3,215 | 45 |
| 1845. | | | | |
| Sept. | 1. | " interest on above from May 1st, 1844, to Sept. 1, 1854, equal to 1 year and 4 mos., | 3,178 | 46 |
| | | " fee to my counsel in settling this estate, | 200 | |
| | | | 43,099 | 52 |
| | | | 43,109 | 42 |
| | | Register's fee and fee of O. Court, advg., &c., | 12 | |

Cr.

| | | | | |
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| 1830. | | | | |
| Jan. | 16, | By income from her father's death, July 14th, 1829, to this date, on 300 shares in the capital stock of B. U. S., | $962 | 50 |
| | | " interest on above to May 1, 1844, 14 years, 3 mos., 15 days, | 825 | 34 |
| July | 17, | " income of bank stock, | 1,050 | 00 |
| | | " int. on above for 13, 9, 24, | 868 | 69 |
| 1831. | | | | |
| Jan. | 29, | " income of bank stock, | 1,050 | 00 |
| | | " int. on above for 13, 3, 2, | 835 | 10 |
| July | 15, | " income of bank stock, | 1,050 | 00 |
| | | " int. for 12, 9, 16, | 806 | 05 |

| | | | |
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| 1832. | | | |
| Jan. 14, | By income of bank stock, | | 1,050 00 |
| | " int. for 12, 3, 17, | | 774 73 |
| July 27, | " income of bank stock, | | 1,050 00 |
| | " int. for 11, 9, 4, | | 740 95 |
| 1833. | | | |
| Jan. 18, | " income of bank stock, | | 1,050 00 |
| | " int. for 11, 3, 13, | | 711 02 |
| July 12, | " income of bank stock, | | 1,050 00 |
| | " int. for 10, 9, 19, | | 680 56 |
| 1834. | | | |
| Jan. 17, | " income of bank stock, | | 1,050 00 |
| | " int. for 10, 3, 14, | | 648 20 |
| July 19, | " income of bank stock, | | 1,050 00 |
| | " int. for 9, 9, 12, | | 616 35 |
| 1835. | | | |
| Jan. 8, | " income of bank stock, | | 1,050 00 |
| | " int. for 9, 3, 23, | | 586 77 |
| July 4, | " income of bank stock, | | 1,050 00 |
| | " int. for 8, 9, 27, | | 555 97 |
| 1836. | | | |
| Jan. 15, | " income of bank stock, | | 1,050 00 |
| | " int. for 8, 3, 16, | | 522 54 |
| | | | $22,734 77 |
| | Amount forward, | | $22,734 77 |
| 1836. | | | |
| July 15, | By income of bank stock, | | 1,200 00 |
| | " int. for 7, 9, 16, | | 561 20 |
| 1837. | | | |
| Jan. 15, | " income of bank stock, | | 1,200 00 |
| | " int. for 7, 3, 16, | | 525 20 |
| July 15, | " income of bank stock, | | 1,200 00 |
| | " int. for 6, 9, 15, | | 489 20 |
| 1838. | | | |
| Jan. 15, | " income of bank stock, | | 1,200 00 |
| | " int. for 6, 3, 16, | | 453 18 |
| July 15, | " income of bank stock, | | 1,200 00 |
| | " int. for 5, 9, 16, | | 417 18 |
| 1839. | | | |
| Jan. 15, | " income of bank stock, | | 1,200 00 |
| | " int. for 5, 3, 16, | | 381 18 |
| July 15, | " income of bank stock, | | 1,200 00 |
| | " int. for 4, 9, 16, | | 345 18 |
| | | | $34,307 09 |

1845.

| | | |
|---|---|---|
| Sept. 1, By int. on the above from May 1st, 1844, 1 year, 4 mos., . . . . . | 2,744 | 56 |
| " allowance of $8 per share for 250 shares of stock, . . . . . | 2,000 | 00 |
| " by balance now due E. S. Ely on this account overpaid, he having already restored 50 shares of the original stock, . . | 4,057 | 77 |
| | $43,109 | 42 |

I do swear that this account as it stands stated and settled, both as to the charge and discharge thereof, is just and true, to the best of my knowledge and belief.

EZRA STILES ELY.

Sworn and subscribed before me Sept. 4th, 1845.

ROBT. F. CHRISTY,
Dep. Register.

City and County of Philadelphia, *ss.*

I certify the foregoing to be a true copy of the account of Ezra Stiles Ely, executor and trustee by will of S. Carswell, deceased, as appears of record, &c., in the office of the Orphans' Court for said city and county.

Witness my hand and seal of said court this 20th day of Nov. 1845.

JOHN A. J. LEWIS,
Pr. Clerk O. C.

*Register's Notice.*

To all creditors, legatees, and other persons interested.

Notice is hereby given, that Ezra S. Ely, executor and trustee of Samuel K. Carswell, deceased, did, on the 4th day of September, 1845, file the accounts of his administration to the estate of the said Samuel K. Carswell, deceased, in the office of the register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia, and that the same will be presented at the Orphans' Court of the said city and county for confirmation and allowance, on the third Friday in October next, at ten of the clock in the morning, at the county court-house in the said city.

R. F. CHRISTY,
Dep. Register.

PHILADELPHIA, September 17, 1845.

Luke McGlue, on oath, doth depose and say, that he, on the 17th day of September, A.D. 1845, did put up three true copies of the above notice, one whereof at the county court-house, one other at

the market-house in High street, and the other at the Merchants' Exchange house, and five others at the most public places, and the above notice he saw put up in the register's office on the day above said, and also that he saw the said notice given and published once a week, for at least four weeks prior to the time appointed for the confirmation and allowance of the within-mentioned accounts, in two newspapers published in the city and county of Philadelphia.

LUKE McGLUE.

Sworn the 22d day of September, A.D. 1845, before
R. F. CHRISTY,
Dep. Register.

I certify that notices in the within case were issued and put up and given in two newspapers, agreeably to the acts of the General Assembly in such case made and provided, as will appear by the above notice and deposition.

Given under my hand and seal of office, this twenty second day of September, A.D. 1845.

R. F. CHRISTY,
Dep. Register.

*Exceptions to Account of E. S. Ely.*

In the matter of the estate of Samuel Carswell, deceased (called the estate of Samuel K. Carswell by accountant).

To the honorable the judges of the Orphans' Court for the City and County of Philadelphia.

Exceptions to the account of Mary Ann Ely Carswell (now Mrs. Miles), issue of S. K. Carswell, in account with Ezra Stiles Ely, executor and trustee by will of Samuel Carswell, deceased, as filed by the said Ezra Stiles Ely in the register's office for the city and county of Philadelphia, September 4th, 1845.

Thomas J. Miles and the said Mary Ann Ely Miles, his wife, crave leave to except to the account of the said Ezra Stiles Ely, filed as above.

1st. Because the interest account is improperly and illegally stated on both sides of the said account; and your exceptants therefore crave leave to object thereto in each and every particular, and to charge the said accountant with interest legally and properly computed in said account.

2d. Because the said Mary Ann Ely Miles is charged in the debtor side of said account, under date of December 13, 1837, with $2200, "cash paid for 11 Marion city lots as per deed," and your exceptants deny the authority of the said accountant to invest the said trust funds, except in productive funds; whereas the said investment always has been and still is wholly valueless and unpro-

1845.

| | | |
|---|---|---|
| Sept. 1, By int. on the above from May 1st, 1844, 1 year, 4 mos., . . . . . | 2,744 | 56 |
| " allowance of $8 per share for 250 shares of stock, . . . . . | 2,000 | 00 |
| " by balance now due E. S. Ely on this account overpaid, he having already restored 50 shares of the original stock, . . | 4,057 | 77 |
| | $43,109 | 42 |

I do swear that this account as it stands stated and settled, both as to the charge and discharge thereof, is just and true, to the best of my knowledge and belief.

EZRA STILES ELY.

Sworn and subscribed before me Sept. 4th, 1845.

ROBT. F. CHRISTY,
Dep. Register.

City and County of Philadelphia, *ss.*

I certify the foregoing to be a true copy of the account of Ezra Stiles Ely, executor and trustee by will of S. Carswell, deceased, as appears of record, &c., in the office of the Orphans' Court for said city and county.

Witness my hand and seal of said court this 20th day of Nov. 1845.

JOHN A. J. LEWIS,
Pr. Clerk O. C.

*Register's Notice.*

To all creditors, legatees, and other persons interested.

Notice is hereby given, that Ezra S. Ely, executor and trustee of Samuel K. Carswell, deceased, did, on the 4th day of September, 1845, file the accounts of his administration to the estate of the said Samuel K. Carswell, deceased, in the office of the register for the probate of wills and granting letters of administration in and for the city and county of Philadelphia, and that the same will be presented at the Orphans' Court of the said city and county for confirmation and allowance, on the third Friday in October next, at ten of the clock in the morning, at the county court-house in the said city.

R. F. CHRISTY,
Dep. Register.

PHILADELPHIA, September 17, 1845.

Luke McGlue, on oath, doth depose and say, that he, on the 17th day of September, A.D. 1845, did put up three true copies of the above notice, one whereof at the county court-house, one other at

the market-house in High street, and the other at the Merchants' Exchange house, and five others at the most public places, and the above notice he saw put up in the register's office on the day above said, and also that he saw the said notice given and published once a week, for at least four weeks prior to the time appointed for the confirmation and allowance of the within-mentioned accounts, in two newspapers published in the city and county of Philadelphia.

LUKE McGLUE.

Sworn the 22d day of September, A.D. 1845, before
R. F. CHRISTY,
Dep. Register.

I certify that notices in the within case were issued and put up and given in two newspapers, agreeably to the acts of the General Assembly in such case made and provided, as will appear by the above notice and deposition.

Given under my hand and seal of office, this twenty second day of September, A.D. 1845.

R. F. CHRISTY,
Dep. Register.

*Exceptions to Account of E. S. Ely.*

In the matter of the estate of Samuel Carswell, deceased (called the estate of Samuel K. Carswell by accountant).

To the honorable the judges of the Orphans' Court for the City and County of Philadelphia.

Exceptions to the account of Mary Ann Ely Carswell (now Mrs. Miles), issue of S. K. Carswell, in account with Ezra Stiles Ely, executor and trustee by will of Samuel Carswell, deceased, as filed by the said Ezra Stiles Ely in the register's office for the city and county of Philadelphia, September 4th, 1845.

Thomas J. Miles and the said Mary Ann Ely Miles, his wife, crave leave to except to the account of the said Ezra Stiles Ely, filed as above.

1st. Because the interest account is improperly and illegally stated on both sides of the said account; and your exceptants therefore crave leave to object thereto in each and every particular, and to charge the said accountant with interest legally and properly computed in said account.

2d. Because the said Mary Ann Ely Miles is charged in the debtor side of said account, under date of December 13, 1837, with $2200, "cash paid for 11 Marion city lots as per deed," and your exceptants deny the authority of the said accountant to invest the said trust funds, except in productive funds; whereas the said investment always has been and still is wholly valueless and unpro-

ductive. Your exceptants therefore crave leave to except to the whole of this item, and to charge the accountant with the same.

3d. Because the accountant claims an allowance of 5 per cent. commission on the principal and interest of said estate, to wit, on $64,307\frac{18}{100}$; whereas the said percentage is an extravagant and unusual charge for the services rendered by the said accountant, and the amount upon which the same is charged is untruly and improperly made up both as to the principal and interest thereof. Your exceptants therefore crave leave to except to this charge, and to have the same properly and legally adjusted.

4th. Because the said Mary Ann Ely Miles is charged with $200 counsel fee for settling the estate, whereas the said estate is not justly chargeable with any counsel fees paid by the said accountant for this purpose.

5th. Because the said accountant, on the credit side of the account, under date of September 1st, 1845, gives credit to the said Mary Ann Ely Miles for $2000, allowance of $8 a share for 250 shares of stock in the Bank of the United States, whereas the said stock has been long since converted by said accountant to his own private use, and the said Mary Ann Ely Miles should be credited with the value of the said stock at the time the same was so converted to the use of the said accountant, and your exceptants therefore crave leave to except to the whole of this item, and to charge the said accountant as he is in law truly chargeable.

6th. Because the said account is imperfect, incorrect, and illegally stated in other respects; to except thereto for which causes more particularly hereafter, your exceptants crave the leave of this court to do.

GEO. W. BIDDLE,
Attorney for Thomas J. Miles and
Mary Ann Ely Miles.

October 20th, 1845.

To the clerk of the Orphans' Court.

*Appointment of Auditor.*

County of Philadelphia, *ss.*

I certify that at an Orphans' Court, for the county aforesaid, held at Philadelphia, on the twenty-first day of November, A.D. one thousand eight hundred and forty-five, before the Honorable Edward King, president, and the Honorable John Richter Jones, James Campbell, and Anson V. Parsons, justices of said court, William King, Esq., was appointed to audit, settle, and adjust the account of E. S. Ely, executor and trustee under the will of S. Carswell, deceased.

Witness my hand and the seal of the said court, this twenty-eighth day of November, A.D. one thousand eight hundred and forty-five.

JNO. A. J. LEWIS,
Per Clerk of the Orphans' Court.

Wm. King being duly sworn according to law, says he will perform the duties of the above appointment with fidelity.

WM. KING.

Sworn and subscribed before me, this twenty-eighth day of March, A.D. 1845.

JOHN A. J. LEWIS,
Per Clerk of Orphans' Court.

*Auditor's Report.*

To the Honorable the justices of the Orphans' Court of Philadelphia County:

The auditor appointed to audit, settle, and adjust the account of Dr. Ezra Stiles Ely, executor and trustee by the will of Samuel Carswell, deceased, of Mary Ann Ely Carswell, now Mrs. Miles, issue of Samuel K. Carswell, deceased, as per certificate hereto annexed, reports that he caused due public and timely notice to be given to all persons interested, of the time and place fixed for entering upon the performance of the duties confided to him, by advertisements in the Legal Intelligencer and the Pennsylvanian newspapers of this city.

Pursuant to the notice so given, your auditor met at Neville's Hotel, George street, on the 7th day of January, 1846, at 4 o'clock P. M., when he was attended by the executor and trustee Dr. Ezra Stiles Ely, and his counsel, James Todd, Esq., also by Wm. M. Meredith, and by George W. Biddle, Esquires, counsel for Mrs. Mary Ann Ely Miles.

It appeared that Samuel Carswell, of the city of Philadelphia, merchant, by his will, dated Sept. 1, 1821, duly proven before the register of the city and county of Philadelphia, March 12, 1822, among other things devised to his executors, and to the survivors and survivor of them, three hundred shares of the stock in the Bank of the United States, in trust, to receive the dividends thereof, and pay one thousand dollars per annum of the said dividends in half-yearly payments, of the said stock should yield that sum per annum, to his son, Samuel Kinsey Carswell, for and during all the term of his natural life, or so long as he remained single and unmarried, and the residue of the dividends beyond the sum of $1000, to be by his said executors placed out at interest for his benefit; but if his said son Samuel marry, then the whole of the dividends should be paid to him during his life, and at his decease the said 300 shares of stock, and the increase thereof, to be equally divided and transferred to all his child and children born unto him in lawful wedlock, then living, and the lawful issue of such of them as should be then deceased, so nevertheless that such lawful issue take and receive such part and share only as his, her, or their deceased parent would have taken if living, with power to his said executors to sell the said stock,

or part thereof, and invest the same in *other productive funds*, if it shall be *deemed more beneficial*, always holding such new investment in the same trust and for the uses aforesaid.

The testator then nominated and appointed his son-in-law, the Rev. Ezra Stiles Ely, his friends General John Steel and William Davidson, executors of his last will and testament. On the 12th May, 1822, letters testamentary were granted the Rev. Ezra Stiles Ely,—Dr. Ely, who also assumed the trust under the will in favor of Samuel Kinsey Carswell.

On the 12th April, 1822, Dr. Ely, as executor of Samuel Carswell, deceased, transferred on the books of the Bank of the United States 300 shares of stock from the estate of said Samuel Carswell, deceased, to the executor of Samuel Carswell, in trust for Samuel Kinsey Carswell, and received a certificate of the same, No. 19,311. On the 29th September, 1822 (about five months after), Dr. Ely, as trustee of Samuel K. Carswell, again transferred the said 300 shares of stock to himself, and received certificate No. 20,724. On the 3d of July, 1835, Dr. Ely having that day borrowed from the bank $50,000 (see account annexed marked ), assigned the same stock to the United States Bank, by the following indorsement on certificate No. 20,724, "July 3, 1835. For value received I assign the within stock to the Bank of the United States in trust." On the 28th August, 1837, a new certificate for the stock was issued to the cashier of the bank, in conformity with Dr. Ely's transfer of the 3d July, 1835.

| | |
|---|---|
| On the 6th November, 1837, 100 shares of the 300 were sold at $120 per share, producing nett, . | $11,977 73 |
| On the 7th November, 1837, 50 shares were sold at the same, . . . . . | 5,997 47 |
| On the 8th Nov., 1837, 100 shares were sold at the same, . . . . . | 12,069 75 |
| | $30,044 95 |

Making the sale of 250 shares, and producing the nett sum of $30,044 95. This sum was credited Dr. Ely's private account with the bank, and went to the payment of his loan of $50,000, on the 3d July, 1835. (See account.)

On the 16th May, 1844, Herman Cope and others, trustees of the Bank of United States, transferred the remaining 50 shares to F. A. Raybold and George Sharswood, trustees of Mary Ann Ely Miles, for which Dr. Ely received a credit on his private account with the Bank of the United States, of $337 50.

Samuel Kinsey Carswell, as stated by Mr. T. Ashmead, married in 1823, and died in 1829, leaving issue a daughter, Mary Ann Ely Carswell, who intermarried with Thos. J. Miles, on the 2d day of October, 1843, having first conveyed all his estate in trust to F. A. Raybold and George Sharswood.

The account under investigation commences from the death of Samuel K. Carswell, July 14, 1829. The state of the trust during the life of Samuel K. Carswell, was not adverted to by either counsel. This settlement relates altogether to the interest of his daughter, Mary Ann Ely Miles.

| | | |
|---|---|---|
| The trustee credits the trust with dividends, from July 14, 1829, to July, 1839. See account, certified by clerk of O. C. marked, | | $34,307 09 |
| Also interest on this sum for one year, | | 2,744 56 |
| Also 250 shares of U. S. Bank stock, at the rate of $8 per share, | | 2,000 00 |
| Total credits, | | 39,051 65 |
| He then charges Mary E. Carswell for her support, from July, 1829, until Nov. 28, 1843, 14 years 4 months, About $483 per annum. | $6,774 01 | |
| Interest on each sum paid from date of payment, | 2,834 00 | |
| | $9,608 01 | |
| Amount of debts brought over, | | $39,051 65 |
| Amount of credits, | $9,608 01 | |
| Marion city lots, | 2,200 00 | |
| Interest on purchase, | 842 60 | |
| 44 shs. Jefferson College stock, at $500 each, | 22,000 00 | |
| Interest on the same since transfer, | 605 00 | |
| Commission to trustee on $64,307 09, | 3,215 45 | |
| Amount paid trustees since marriage, | 1,250 00 | |
| | $39,721 06 | |
| Interest on $39,721 06, 1 year, 4 months, | 3,178 46 | |
| Counsel fee, | 200 00 | |
| | $43,099 52 | |
| Deduct credits for dividends, &c., per acct. | 39,051 65 | |
| Balance due Dr. Ely, per account annexed, | 4,047 77 | |
| To this balance Dr. Ely by his counsel, J. Todd, Esq., asked to add for additional Marion city lots (omitted in account), and purchased May 7, 1837, by note at | | |
| 12 months, $1,400 00 | | |
| 24 " 1,400 00 | | |
| 36 " 1,400 00 | 4,200 00 | |
| | $8,247 00 | |

Making a balance due Dr. Ely, at filing his account Sept. 1, 1845, of $8,247 77.

The counsel for the exceptants objected to the account, and claimed to revise it by charging the accountant with the actual dividends received on 300 shares of stock, from the date of the death of Samuel K. Carswell, July 14, 1829, until August 27, 1837, when 250 shares of the same were sold, and from the date with the 300 shares at the price sold to net $120 per share, and interest on the same.

| | |
|---|---|
| The charges relating to the Marion city lots, . . | $6,400 00 |
| And the 250 shares of stock at $8 per share, . . | 2,000 00 |

And the 50 shares of the original stock said to have been restored, they required should be stricken from the account. They further asked the auditor to state an interest account in all sums received and paid by the trustees yearly, and ascertain the sums required to be invested under the will and the legal accumulations thereon.

J. Todd, Esq., sustained the account as filed and amended, on the ground,

First. Of the authority of the will.

Second. That the transfer of the stock from the trust to the executor's private account on the 29th Sept. 1822, was for the protection and preservation of the same, Samuel K. Carswell being *then* in embarrassed circumstances.

Third. The money obtained by the stock, July 3d, 1835, had been invested in 1835, '36, and '37. That he also conveyed Western lands, Nov. 22, 1837, to Samuel McClellan, for the debt of his ward and others.

Fourth. That the husband of Mrs. Mary Ann Ely Miles had agreed that he should account for the dividends actually received on the stock and the stock itself at its then value.

Finally. That the trustee in selling the stock, had benefited the estate; the whole management had been in good faith without fraudulent intention and with a reasonable discretion and judgment.

Mr. Thomas Ashmead was sworn and examined; said S. K. Carswell was in embarrassed circumstances, and went to the West Indies fearful of being caught by his creditors. There was a fear his stock would be attached. Dr. Ely was worth $80,000 in 1822. Dr. Samuel McClellan testified, in the year 1830, Dr. Ely was worth, in his opinion, from $100,000 to $150,000. That the purchase of the Marion city lots was done through the grandmother, then acting as the personal guardian. The ward herself desired to have some of the lots, and was then about ten years of age. The investments were thought good, and men of sense and sagacity entered into it. He had bought for his wife $2,000 in lots in the said city; they were bought on one, two, and three years' time.

F. A. Raybold, Esq., stated that Mr. Miles said to him "If the Dr. would give all the shares of the stock and account for all the dividends received and might have been received, had he held it, and the *interest thereon*, he would agree to settle." This occurred previous to May 17, 1844. On the first May, 1844, he received from Dr. Ely 44 shares of Jefferson Medical College stock, and on the 17th of the same month 50 shares of the United States Bank stock, certificate No. 21,069. He could not say the stock was handed over in consequence of the above conversation; nothing was said at the time.

James Todd, Esq., said the trustee had a right under the will to change the investment. The transfer from the trust to Dr. Ely personally in Sept. 1822, was made to protect and preserve the stock, S. Kinsey Carswell being then embarrassed. In 1835, when it was evident the general government would not re-charter the Bank of the United States, Dr. Ely determined to sell. He hypothecated it with some other stock of his own, and borrowed $50,000, $30,000 of this was in the stock of this trust. With the money he went into Missouri, and invested it in lands and town lots. He bought $6400 in Marion city lots for his ward. It was thought the investment would double in a year or two. There is a point of law well understood. If a trustee uses the money of his trust, the gain, if any, is the trust's; if he loses, the loss is his. The Dr. therefore *took the risk*. The bank had suspended specie payments when the stock was sold, and the payments were in the depreciated currency of the country. Lands in Missouri were bringing $9 per acre when the banks were compelled to resume specie payments. Lands fell, all property depreciated, and Dr. Ely lost $100,000. From a rich man he became comparatively a poor one, and in this reduced condition makes every exertion to save and protect his ward. After this, Dr. Ely, in conversation with the husband of his ward, observed that the parties were better off than if the stock had not been sold. The husband then made the answer, upon which he *transferred Jefferson College stock*, but now the suggestion made was lost sight of. Can there be any doubt upon what terms the trustee *transferred the Jefferson Medical College stock?* The trustee had acted without fraud, and to the best of his judgment, this was sufficient to save him harmless. Mr. Todd referred to Gocheneaue *v.* Froleich & Watts, page 19. The court has a tenderness for trustees who act in good faith. This doctrine has been recognized by Chancellor Kent and every other chancellor. No loss had accrued to this fund, but it was bettered by the acts of Dr. Ely, this he would show. By decisions of the Supreme Court (see Galbach's appeal, 8 Sergeant & Rawle, 205, Bowman's appeal, same book), the ward is bound to take the Marion city lots at $6400; in both the cases quoted, the trustee kept their ward's interest in the lands in which they had a share. Losses were sustained, and the court sustained the guardian.

We are not to judge of the propriety of acts by what happens after the transaction. That Dr. Ely acted in good faith is shown by the fact of investing his own money in the same land with his wards. The other counsel contend Dr. Ely must not only act in good faith, but also with good judgment. It was not to be expected that Dr. Ely should fully understand all the niceties of managing money. The testator knew him to be a man of great talents in his profession, but deficient in this knowledge, notwithstanding he took the risk. The exceptants judge Dr. Ely by results which is not the mode. It is an admitted principle of law that if a trustee speculate upon the money of his trust, the gain is for the trust, the loss is the trustee's. With this knowledge Dr. Ely invested in the lands, but good faith and ordinary prudence will exonerate him from loss. He invested $100,000 of his own funds in these lands. Other citizens, of reputation for intellect, bought also. The two facts show good faith and ordinary prudence. Here Dr. Ely is exonerated from the consequence, he is only obliged to put the parties in as good a position as if he had not sold the stock. Mr. Biddle admitted the trustee had a right to change the investment, but was bound to make the change productive, but he said the change was not made to serve the interest of the *cestui que trust*. The change from the trust to himself caused the bank, thereafter, to consider the stock his private property. A trustee must not lodge trust money so as to place it out of his control, Solway *v.* Solway, 4 Russell, page 60. A partial putting such money out of his control is, in effect, the same as wholly. In 1835 Dr. Ely placed the stock out his control: how could he have sold had he seen the depreciation of the stock, the same being then hypothecated.

The law is if a trustee uses funds he is liable. We shall claim for the whole 300 shares.

The investment in the Marion city lots are not productive within the meaning of the will, which authorizes a change into other productive security. The form to change investments is defined by law, and is not a change at the caprice of the trustee. Suppose Dr. Ely had invested the whole in Marion city lots, how was his ward to be supported? If he had a right to invest a part, he might invest the whole. As to the interest, he would deduct the sums paid and allow interest, as determined by the court, upon the balance. Verner's estate, 6 Watts, when the trustee mixes the fund with his own he must account for 6 per cent. The fee claimed for counsel, $200, is rather a fee to litigate the settlement than benefit the estate.

The testator having used the stock must account for its value at the time, and cannot substitute depreciated stock in its place.

In deciding the points presented to him your auditor will consider the acts of the trustee in the order they occurred. Dr. Ely made proof of the will of Samuel Carswell, deceased, in March 12, 1822, when letters testamentary were granted him. On the 12th April,

following, he transferred 300 shares of stock on the books of the United States Bank, from the estate of Samuel Carswell, deceased, to himself, as executor and trustee of Samnel K. Carswell, and received as such certificate for the stock No. 19,311. On the 27th September, the same year, six months from the date of letters testamentary, Dr. Ely again transferred the said 300 shares of the stock standing in the name of the trust, to his individual account with the bank. This act of power involved the most important consequences. It thus became his private property, and was from thence liable to all the risks and responsibilities connected with his affairs. The estate of Samuel K. Carswell had no longer an independent and secure existence, and his future support was to be determined by the strength and steadiness of his trustee's private resources. It has been urged the embarrassed situation of Samuel K. Carswell required the transfer. It cannot, however, be supposed, by any ordinary means, his debts could have been large six months after the proof of the will. But admitting he was largely in debt, there was neither necessity or security in the transfer. The stock was held in trust; all his right was in the $1000 per annum income. If anything was in jeopardy it was this alone, though it is very doubtful it could have been affected. The stock was sufficiently protected by the will.

On the 3d July, 1835, Dr. Ely hypothecated the 300 shares, and borrowed the sum of $50,000. Thirty thousand dollars were on this particular property. The bank was in full credit, its notes were equivalent to gold and silver all over the world, and the dividends at the rate of seven per cent., and yield in this trust $2100 per annum, as appears by the account filed. No part of this loan was invested at the time for the ward.

The lots in Marion city were not bought until May 7, 1837, and then not with money, but upon the notes of Dr. Ely of that date, at 12, 24 and 36 months for $1400 each, . . $4200 00
A deed for eleven lots was executed Nov., 1837, . 2200 00

$6400 00

None of these lots were productive of income, and therefore not within the meaning and authority of the will. Had the whole fund been thus adventured (for if a part might, so might the whole) the ward would have been destitute of income, whilst rated on paper the possessor of thousands.

The 44 shares of Jefferson Medical College stock, valued at $22,000, Dr. Ely stated he purchased in 1837. J. Todd, Esq., states, in his argument, that it was transferred to the present trustees upon the expectation of settling on the terms mentioned in a conversation held between Dr. Ely and Mr. Miles, the husband of his ward. It did not appear the Jefferson Medical College stock was bought in the name of this trust, the rate of cost was not given,

and there was no means of ascertaining whether there was a gain or loss upon the purchase. Independently of this stock being bought in 1837, it cannot be considered as an investment of any part of the $30,000 obtained in July, 1835. The pledge of the stock in that year could only have been, in the opinion of your auditor, for the private objects of Dr. Ely, nor was any part of the actual sales of the same in August, 1837, used or invested for this trust. On reference to the trustee's private account with the bank (see copy annexed) it will be found the proceeds of the 250 shares went to pay part of the loan of 1835, and here the argument of J. Todd, Esq., that the proceeds of the sale was paid in depreciated paper, falls to the ground. If the curreney was bad the bank received in settlement for the money loaned Dr. Ely, in 1835, then equivalent to gold and silver. It is also well known that current bank paper of this city, in 1837, could have been converted into gold at 2 or 3 per cent. premium. The fact that Mr. Miles offered to settle with Dr. Ely upon certain terms, can have no influence in the settlement of this account. At the time mentioned Mr. Miles had no authority over the property of his wife. It was in the hands of J. S. Raybold and Geo. Sharswood, her trustees before marriage. The next point to be considered is whether the trustee acted without fraudulent intentions, in good faith, and with a reasonable discretion, and having done so, whether he is liable for any loss, and whether he has placed the trust in a better condition than if he had not sold.

The transferring the stock to himself six months after assuming the trust, and having so kept it for 13 years, subject to all the hazards of his affairs, the pledging and finally selling the same, and applying the proceeds, $30,044, to the payment of his debt to the bank, are acts which your auditor cannot recognize as consistent with the duties and obligations imposed upon him by this trust. He considers each transaction a violation of the same, and the exposure of his ward's estate to all the hazards of ruin. Had the disaster which befell Dr. Ely in 1837 happened in 1823, Samuel K. Carswell might have been left penniless. The trustee has clearly appropriated the money of the trust to his own use, and by the well-known and well-established principles of law he must abide the consequences.

As to the paying for or restoring the stock at a depreciated value, and the assertion that the estate is in a better condition than if the stock had never been sold, this seems the stronghold of the defence; no reasoning can, however, alter the fact that Dr. Ely sold 250 shares of his ward's stock in 1837, and received $30,044 99 for the same. The depreciation afterwards was indeed a serious matter to the *holder*, but did not, in any manner, affect the seller.

Dr. Ely, in acting as he did, took the risk, and must now account for the property so taken and used.

Your auditor has framed the annexed account in accordance with his opinion, charging the trustee with the actual dividends received,

as per his accounts, from July 14th, 1829, until May, 1837, when five-sixths of the stock was sold from that date, with 300 shares, at $120 each. From the income all payments for the use of the ward, and other proper purposes, will be deducted annually. The surplus in each year considered a fund for investment, as directed by the will. An interval of three months will be allowed for obtaining the same, and from that time interest, until November 1, 1846, charged. Credit will be allowed for the 44 shares Jefferson Medical stock, from date of transfer, with interest. The 250 shares of stock at $8, and 50 shares restored trustees, but at no definite value, are altogether rejected.

By account No. 1, annexed, constructed as above, your auditor finds and now report Dr. Ezra Stiles Ely indebted to his late ward, Mary Ann Ely Miles, in the sum of fifty-seven thousand four hundred and nine dollars fifty-five cents, the same being carried to November 1, 1846.

Your auditor has also appended account No. 2, as explanatory of his first statement. This second account shows Dr. Ely would be indebted to his ward, at simple interest, $54,861 51. No commission has been allowed Dr. Ely, upon the ground a delinquent trustee is entitled to none. Nor has the counsel fee of $200 been allowed, the counsel being adverse to the interests of this estate.

All which is respectfully submitted,

WILLIAM KING,
Auditor.

September 4, 1846.

*Account No.* 1.

Dr. Ezra Stiles Ely in account with Mary Ann Ely Miles.

| | Yearly income. | Yearly expense. | Yearly debt. | 9 months' interest. | 1 year's interest. | Accumulation of interest. | Yearly investment. |
|---|---|---|---|---|---|---|---|
| 1829, July 1. | | | | | | | |
| Dividend in stock to Jan. 7, 1830, | $962 50 | $250 00 | $712 50 | $32 17 | $42 75 | | $712 50 |
| " " " Jan. 7, 1831, | 2,100 00 | 429 25 | 1670 75 | | | | |
| 9 months' interest on $712 50, | | | 32 17 | | | | |
| | | | 1702 92 | 76 68 | 102 12 | | 1702 92 |
| January, 1832, . . . | 2,100 00 | 483 97 | 1616 03 | | | | |
| 1 year's interest on $712 50, . | | | 42 75 | | | 1832, $42 75 | |
| 9 months' interest on $1702 92, | | | 76 68 | | | 1833, 144 87 | |
| | | | 1735 46 | 78 07 | 104 10 | | 1735 46 |
| January, 1833, . . . | 2,100 00 | 373 68 | 1726 32 | | | '34, 248 97 | |
| Increase of interest to 1833, . | | | 144 87 | | | | |
| 9 months' interest on $1735 46, | | | 78 07 | | | | |
| | | | 1949 26 | 86 70 | 116 94 | '35, 365 91 | 1949 26 |
| January, 1834, . . . | 2,100 00 | 460 16 | 1639 84 | | | | |
| Increase of interest to 1834, . | | | 248 97 | | | | |
| 9 months' interest on $1949 26, | | | 86 70 | | | | |
| | | | 1975 51 | 88 88 | 118 50 | '36, 484 41 | 1975 51 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| January, 1835, . . . | 2,100 00 | 60 00 | 2040 00 | | | | |
| Increase of interest to 1835, . | | | 365 91 | | | | |
| 9 months' interest on $1975 51, | | | 88 88 | | | | |
| | | | 2494 79 | 112 23 | 149 67 | '37, 634 08 | 2494 79 |
| January, 1836, . . . | 2,100 00 | 393 38 | 1706 62 | | | | |
| Increase of interest to 1836, . | | | 484 41 | | | | |
| 9 months' interest on $2494 79, | | | 112 23 | | | | |
| | | | 2303 26 | 103 59 | 138 18 | '38, 772 26 | 2303 26 |
| January, 1837, . . . | 2,400 00 | 438 40 | 1961 60 | | | | |
| Increase of interest to 1837, . | | | 634 08 | | | | |
| 9 months' interest on $2303 26, | | | 103 59 | | | | |
| | | | 2699 27 | 121 45 | 161 94 | '39, 934 20 | 2699 27 |
| January, 1838, . . . | 2,280 00 | 388 63 | 1891 37 | | | | |
| Increase of interest to 1838, . | | | 772 26 | | | | |
| 9 months' interest on $2699 27, | | | 121 45 | | | | |
| | | | 2785 08 | 125 33 | 167 11 | '40, 1101 31 | 2785 08 |
| January, 1839, . . . | 2,160 00 | 450 00 | 1710 00 | | | | |
| Increase of interest to 1839, . | | | 934 20 | | | | |
| 9 months' interest on $2785 08, | | | 125 33 | | | | |
| | | | 2769 53 | 124 61 | 166 14 | '41, 1267 45 | 2769 53 |

| | Yearly income. | Yearly expense. | Yearly debt. | 9 months' interest. | 1 year's interest. | Accumulation of interest. | Yearly investment. |
|---|---|---|---|---|---|---|---|
| January, 1840, | 2,160 00 | 564 38 | 1595 62 | | | | |
| Increase of interest to 1840, | | | 1101 31 | | | | |
| 9 months' interest on $2769 53, | | | 124 61 | | | | |
| | | | $2821 54 | 126 95 | 169 26 | '42, 1436 71 | 2,821 54 |
| | $22,562 50 | $4291 85 | | $1076 66 | $1436 71 | $7432 92 | $23,949 12 |
| Amount brought over, | $22,562 50 | $4291 85 | | $1076 66 | $1436 71 | $7432 92 | $23,949 12 |
| January 1, 1841, | 2,160 00 | 350 38 | 1809 62 | | | | |
| Increase of interest to 1841, | | | 1267 45 | | | | |
| 9 months' interest on $2821 54, | | | 126 05 | | | | |
| | | | 3204 02 | 144 18 | 192 24 | '43, 1628 95 | 3,204 02 |
| January 1, 1842, | 2,160 00 | 446 69 | 1713 31 | | | | |
| Increase of interest to 1842, | | | 1436 71 | | | | |
| 9 months' interest on $3204 02, | | | 144 18 | | | | |
| | | | 3294 20 | 148 23 | 197 64 | '44, 1826 59 | 3,294 20 |
| January 1, 1843, | 2,160 00 | 400 00 | 1760 00 | | | | |
| Increase of interest to 1843, | | | 1628 95 | | | | |
| 9 months' interest on $3294 20, | | | 148 23 | | | | |
| | | | 3537 18 | 159 12 | 212 16 | '45, 2038 75 | 3,537 18 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| January, 1844, . . . | 2,160 00 | 429 13 | 1730 87 | | | | |
| Increase of interest to 1844, . | | | 1826 59 | | | | |
| 9 months' interest on $3537, . | | | 159 12 | | | | |
| | | | 3716 58 | 167 22 | 222 96 | '46, 2261 71 | 3,716 58 |
| January 1, 1845, . . . | 2,160 00 | 855 96 | 1304 04 | | | | |
| Increase of interest to 1845, . | | | 2038 75 | | | | |
| 9 months' interest on $3716, . | | | 167 22 | | | | |
| | | | 3510 01 | 157 95 | | | 3,510 01 |
| January 1, 1846, . . . | 2,160 00 | | 2160 00 | | | | |
| Increase of interest to 1846, . | | | 2261 71 | | | | |
| 9 months' interest on $3510 01, | | | 157 95 | | | | |
| July 1, 1846, . . . . | 1,080 00 | } | 1800 00 | | | | |
| Nov. 1, " . . . . | 720 00 | } | | | | | |
| | | | 6379 66 | 1,853 36 | | $15,188 92 | |
| | | | | 15,188 92 | | Cash in hand, | $6,379 66 |
| Total yearly income, . . | $37,322 50 | $6774 01 | | $17,042 28 | | Gain to est., | $47,590 77 |
| Deduct expenses, . . . | 6,774 01 | | | | | | |
| Amount revenue, . . . | $30,548 49 | | | | | | |
| Add increase of interest, . . | 17,042 28 | | | | | | |
| Increase of interest and investments since Jan., 1830, and to Nov. 1, 1846, . . . | $47,590 77 | | | | | | |

*Account No. 1, Dr.*

Dr. Ezra Stiles Ely in account with Mrs. Mary Ann Ely Miles.

| | | | | |
|---|---|---|---|---|
| 1846. Nov. 1, | Brot. over investments of surplus revenue from January 1, 1830, until Nov. 1, 1846, | | | 47,590 77 |
| | To this add value of 300 shares United States Bank stock (250 shares of which was sold by Dr. Ely, for the sum of $30,044 99, and the amount received by him), at the rate of $120 per share, | | | 36,000 00 |
| | Total debit, | | | $83,590 77 |
| | Cr. | | | |
| 1843. Nov. 1, | By cash paid trustees, | | 1,000 00 | |
| 1844, | Interest on same 1 year, | | 60 00 | |
| 1845, | ditto | | 60 00 | |
| | 9 months' interest on $60, | | 2 70 | |
| 1846, | 1 year's interest, | | 60 00 | |
| | 1 year's interest on $62 70, | | 3 76 | |
| 1844. May 1, | Jefferson College stock, | | 22,000 00 | |
| 1845, May 1, | one year's interest, | | 1,320 00 | |
| 1846, | " " | | 1,320 00 | |
| " | " one year's interest on $1320, | | 79 20 | |
| 1844, Jany. 8, | cash paid trustees, $250 00 | | | |
| | Interest on ditto as above, 25 56 | | 275 56 | |
| | | | $26,181 22 | 26,181 22 |
| | Balance due by Dr. Ely, | | | $57,409 55 |
| | To his late ward, Mrs. Mary Ann Ely Miles, $57,409 55. | | | |

WILLIAM KING,
Auditor.

September 4th, 1846.

*Account No. 2, Dr.*

Ezra Stiles Ely in account with Mary Ann Ely Miles.

| | Income. | Outlay. | Surplus. | Time. | Int. on Surplus. | |
|---|---|---|---|---|---|---|
| 1829. July 1 until January 1, 1830, | 962 50 | 250 00 | 712 50 | 16 years, 8 mos. | 712 50 | |
| " '31, | 2100 00 | 429 25 | 1670 75 | 15 " 8 " | 1570 40 | |
| " '32, | 2100 00 | 483 97 | 1616 03 | 14 " 8 " | 1422 08 | |
| " '33, | 2100 00 | 373 68 | 1726 32 | 13 " 8 " | 1415 45 | |
| " '34, | 2100 00 | 460 16 | 1639 84 | 12 " 8 " | 1246 02 | |
| " '35, | 2100 00 | 60 00 | 2040 00 | 11 " 8 " | 1428 00 | |
| " '36, | 2100 00 | 393 38 | 1706 62 | 10 " 8 " | 1091 84 | |
| " '37, | 2400 00 | 438 40 | 1961 60 | 9 " 8 " | 1137 88 | |
| To value of stock sold Aug. 1837 at $120 per share, . . . . | | | | | | 36,000 00 |
| January 1, 1838. | | | | | | |
| Dividend paid by bank July, 1838, | 1200 00 | | | | | |
| Int. on $36,000 to January 1, 1838, | 1080 00 | 388 63 | 1891 37 | 8 " 8 " | 983 32 | |
| " 1839, | 2160 00 | 450 00 | 1710 00 | 7 " 8 " | 786 60 | |
| " '40, | 2160 00 | 564 38 | 1595 62 | 6 " 8 " | 638 18 | |
| " '41, | 2160 00 | 350 38 | 1809 62 | 5 " 8 " | 615 21 | |
| " '42, | 2160 00 | 446 69 | 1713 31 | 4 " 8 " | 479 64 | |
| " '43, | 2160 00 | 400 00 | 1760 00 | 3 " 8 " | 387 20 | |
| " '44, | 2160 00 | 429 13 | 1730 87 | 2 " 8 " | 276 90 | |
| " '45, | 2160 00 | 855 96 | 1304 04 | 1 " 8 " | 130 46 | |
| " '46, | 2160 00 | | 2160 00 | 8 " | 86 40 | |
| July '46, | 1080 00 | | 1080 00 | | | |
| Nov. 1, '46, | 720 00 | | 720 00 | | | |
| | $37,322 50 | $6,774 01 | $30,548 49 | | $14,408 02 | |

| | Cr. | | | | |
|---|---|---|---|---|---|
| 1843. Nov. | Cash paid trustees, . . | 1,000 00 | | 30,548 49 | 44,956 51 |
| 1844. " | 1 year's interest, . . | 60 00 | | | |
| 1845, " | 1 do. . . | 60 00 | | $44,956 51 | $80,956 51 |
| 1846. " | 1 do. . . | 60 00 | | | |
| 1 year's interest on $6270, | . . | | | | 26,095 00 |
| 1844. January cash, | . . . | 250 00 | | | |
| January 1, 1845, interest, | . . | 11 25 | 26,095 00 | Balance due ward at simple int., | $54,861 51 |
| " 1, 1846, " | . . | 13 75 | | | |
| 1844. May 1, stock Jeff. Coll., | . | 22,000 00 | | | |
| 2 years' interest, | . | 2,640 00 | | | |

*Exceptions to Auditor's Report.*

In the matter of Carswell's estate. Exceptions to the auditor's report and to his decision in overruling testimony offered by Dr. Ely, the trustee.

1. It was proposed to be given in evidence on the part of Dr. Ely, that after the hypothecation of the $50,000 worth of stock, Dr. Ely took the entire funds, his own and his ward's, and invested the whole in houses, lands and town lots, in the State of Missouri; that it was thought at that time a good investment; but on the banks resuming specie payments, those houses, lands and town-lots fell to a mere nominal price, and were sold under various executions, and thus Dr. Ely was reduced to comparative poverty; that when the dark days were approaching, Dr. Ely did all in his power to save the funds of his ward; that to effect that purpose, he executed a deed of trust, and subsequently a mortgage, both of which were offered in evidence. This evidence was *rejected* by the counsel of Mrs. Miles, and overruled by the auditor. In this we think the auditor erred, and file this as our first objection.

2. The auditor has not fully stated the facts as given in evidence; we therefore pray that the testimony taken before him may be filed with the report.

3. The auditor erred in charging us with the value of the stock in 1837, it appearing from his own report and the testimony, that we became the owners of the stock in 1822.

4. The auditor erred in charging us with dividends received after the stock was transferred to us in 1822 up till 1837, and after that, with the interest on $36,000, when the whole amount sold was 250 shares, at a little more than $30,000,—fifty shares having always remained in bank, and having been transferred to the present trustees, and on which neither interest nor dividend was paid after the 15th July, 1839.

5. The auditor should have given us credit for the Marion city lots, as they were purchased for Mrs. Miles, and paid for by Dr. Ely, and purchased with the consent of the grandmother, and certainly in good faith.

6. The auditor should have allowed us credit for the 50 shares of stock returned at all events, as they always remained in the bank. We could in no event be chargeable with more than the value in 1822, when they were first transferred to Dr. Ely.

7. Under all the circumstances of this case, we were entitled to the commissions and the counsel fee.

8. The auditor should have settled an account upon the principles contended for by the accountant, viz., all the accountant should have been called upon to do, was either to give up the profits made by him out of the trust-fund, or if more were made, then to place the ward in as good a position as if the funds had remained

in the stock of the United States Bank, as it was at the death of the testator, and this on principle of justice, as well as the agreement of the parties.

9. The auditor should have settled the account according to the agreement of the parties made in April, 1844, in pursuance of which agreement, we transferred the Jefferson Medical College stock, $22,000, and transferred the 50 shares of stock to the trustees, F. A. Raybold, Esq., and Judge Sharswood.

10. The auditor erred in charging us with the price of 300 shares in 1837. The testimony shows but 250 sold; the other fifty were not sold, nor is there any proof that they could have been sold; at all events, Dr. Ely was not bound to sell them.

11. The auditor erred in charging interest on interest.

*Report of Auditor after hearing Exceptions.*

Your auditor, pursuant to the rule of court, gave notice to William M. Meredith and George W. Biddle, Esquires, counsel for Mrs. Miles, and Jas. Todd, Esquire, counsel for Ezra Stiles Ely, of the intended filing of this report, whereupon Jas. Todd, Esq., submitted to your auditor the within exceptions to the same.

A meeting was fixed for the hearing of the said exceptions at Jas. Todd, Esq.'s office, on 22d September, 1846, at 11 o'clock, A.M., and due notice given all the counsel.

Your auditor having met on the 22d September as fixed, considered the exceptions, and still adhere to the report filed.

In answer to the exception that the auditor charges the trustee with the dividends on the stock after he took the same in 1822, your auditor observes in explanation, that he considered Dr. Ely, after taking the stock in 1822, never invested the same, therefore, in fixing the revenue it should have produced, he adopted the dividends actually paid on the stock until 1837, and after that 6 per cent. upon the value of the whole, at the rate 250 shares sold. If there is an error in adjusting the revenue, it is from 1837 to 1839, when the stock paid per acct. filed, $2400 per annum, whilst the auditor charges only $2160.

All which is respectfully submitted.

WM. KING,
Auditor.

September 22, 1846.

*Decree of Court confirming Auditor's Report.*

At an Orphans' Court for the City and County of Philadelphia, held at Philadelphia, on the twenty-first day of October, A.D. 1846.

In the matter of the estate of Samuel Carswell, deceased.

Sur exceptions to report of auditor on the account of Dr. Ezra Stiles Ely, trustee.

This cause coming on to be heard and argued by counsel in support of the exceptions to the report of the auditor filed in the above estate, upon debate of the matter, the court doth order and decree, that the said exceptions, except the sixth exception relating to a credit claimed by the accountant for fifty shares of stock in the Bank of the United States, transferred May 1st, 1844, by said accountant, to George Sharswood and F. A. Raybold, trustees of Mary Ann Ely Miles, be dismissed, and that the sum of five thousand dollars be deducted from the balance found due from the accountant by the report of the said auditor, as an allowance for the said fifty shares of stock in the Bank of the United States, at which sum the value of said fifty shares of stock has been fixed by agreement filed.

And it is further ordered and decreed, that the rest of the report of the said auditor be confirmed absolutely, and that the said accountant, Dr. E. S. Ely, be charged with the sum of $49,861 51, the balance found due from him, after first deducting therefrom the sum of five thousand dollars as an allowance for the said fifty shares of stock in the Bank of the United States.

Witness my hand and seal of said court, this 3d day of November, 1846.

JNO. A. LEWIS,
Pr. Clerk O. C.

*Petition of E. S. Ely in reference to the amount of Bail for appeal to Supreme Court.*

To the Honorable the Judges of the Orphans' Court in and for the City and County of Philadelphia.

The petition of Ezra Stiles Ely, of the county of Philadelphia, respectfully represents, that he filed his accounts as trustee of the estate of Mary Ann E. Miles, formerly Mary Ann Ely Carswell, on the day of , 1845, which was subsequently referred to an auditor, who reported a balance against him of $54,861 51; that he filed exceptions to this report, which, had they been allowed, would have brought out a balance in his favor of $8247 77. That the court on hearing, and on the agreement of the parties, allowed this applicant a credit of $5000, and confirmed the report of the auditor for the balance, amounting to $49,861$\frac{51}{100}$; that there is nothing in his hands that can be wasted, nor can any injury arise to the cestui que trust by allowing your petitioner to appeal to the Supreme Court, upon entering security sufficient to cover the costs. That if the court should order a large amount of bail, it would be equivalent to a denial of his right of appeal altogether; that important principles are involved in the case which have not yet (as he has been instructed) been settled; he therefore respectfully prays your honors to fix the amount of bail, and the conditions thereof,

so that he may be enabled to appeal and have his case reviewed by the Supreme Court, and he, as in duty bound, will pray, &c.

EZRA STILES ELY.

City of Philadelphia, *ss.*

Personally appeared before me, Ezra Stiles Ely, who being duly sworn doth depose and say, that the facts set forth in the foregoing petition are just and true as stated, to the best of his knowledge and belief.

EZRA STILES ELY.

Sworn and subscribed this 5th day of Nov., 1846.

Coram. THOMAS G. SMITH,
Alderman.

*Rule of Court relating to Ely's Petition.*

Friday, Nov. 6, 1846.

In the matter of the report on the accounts of Ezra Stiles Ely, on the petition of said Ely, the court grant a rule on the cestui que trust and her present trustees, Geo. Sharswood and Fredk. A. Raybold, Esqs., to show cause why the bail to be entered for appeal from the decision of the Orphans' Court in the above case, should not be merely in a sum sufficient to cover the costs; returnable on the 3d Friday of November, 1846.

*Attachment.*

Philadelphia County, *ss.*

The Commonwealth of Pennsylvania, to the sheriff of Philadelphia County, greeting:

We command you, that you take Dr. Ezra Stiles Ely, late of your county, if he be found in your bailiwick, and him safely keep, so that you have his body before our judges at Philadelphia, at an Orphans' Court for the city and county of Philadelphia, to be holden on the first Friday in April next (April 2, 1847), at 10 o'clock in the forenoon, to answer us for a contempt in not appearing at our said court, according to the exigency of our writ of citation served on him, to pay the am't decreed by the court in the matter of the estate of Samuel Carswell, deceased, viz., $49,861 51, to George Sharswood and Fred'k A. Raybold, trustees of Mrs. Mary Ann Ely Miles, as a legacy due by the estate of Samuel Carswell to George Sharswood and Fred'k A. Raybold, trustees of Mrs. Mary Ann Ely Miles, according to the auditor's report.

And have you then and there this writ.

Witness the Honorable Edward King, president of our said court, at Philadelphia, the twentieth day of March, A. D. 1847.

DAVID HANLY,
Clerk.

County of Philadelphia, *ss.*

I certify that the foregoing is a true copy of all the proceedings in the matter of the estate of Samuel Carswell, deceased, as full and entire as the same appear of record in the office of the clerk of the Orphans' Court for the county aforesaid.

Witness my hand, and the seal of the said court, this thir-
[SEAL.] tieth day of April, A. D. 1850.

JACOB BROOM,
Clerk, O. C.

Pennsylvania, Philadelphia County, *ss.*

I, Edward King, Esquire, president of the First Judicial District of Pennsylvania, and presiding judge of the Court of Common Pleas, Orphans' Court, and Court of General Quarter Sessions of the Peace for the city and county of Philadelphia, do

Certify, that Jacob Broom, by whom the annexed record, certificate and attestation were made and given, and who in his own proper handwriting has thereunto subscribed his name and affixed his official seal, was at the time of so doing, and now is clerk of the Orphans' Court in and for the county of Philadelphia, in the commonwealth of Pennsylvania, duly commissioned and qualified, to all whose acts as such full faith and credit are and ought to be given as well in courts of judicature as thereout, and that the said record, certificate, and attestation are in due form, and made by the proper officer.

In testimony whereof I have hereunto set my hand, the thirtieth day of April, eighteen hundred and fifty.

EDWARD KING,
President Judge O. C., Phila.

Philadelphia County, *ss.*

I, Jacob Broom, Esq., clerk of the Orphans' Court for the county of Philadelphia, do certify that the Honorable Edward King, Esquire, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is president of the First Judicial District of Pennsylvania, and presiding judge of the Court of Common Pleas, Orphans' Court, and Court of General Quarter Sessions of the Peace for the city and county of Philadelphia, duly commissioned and sworn, to all whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere.

In testimony whereof I have hereunto set my hand, and
[SEAL.] affixed the seal of the said court, the thirtieth day of April, eighteen hundred and fifty.

JACOB BROOM,
Clerk, O. C.

Indorsed. Sharswood and Raybold, trustees, *v.* Ezra Stiles Ely, attachment; exemplification of the record in the Orphans' Court for the county of Philadelphia, State of Pennsylvania, in the matter of the estate of Samuel Carswell, dec'd; Ezra Stiles Ely, executor, and trustee (by will) of Mary Ann Ely Miles. Filed this 9th August, 1850, Tho. E. Thompson, clerk. D.

*Copy of Docket Entries.*

In the Court of Common Pleas for the City and County of Philadelphia.

Among other things it is thus contained in equity docket entries.

GEORGE SHARSWOOD and
FRED'K A. RAYBOLD, trustees of
MRS. MARY ANN ELY MILES,
*v.*
SAMUEL MCCLELLAN and
MARGARET CARSWELL.

Geo. W. Biddle. Todd, Scott, for Margaret Carswell.

Dec. term, 1848, No. 2. Sub. in equity. Ext. 11 Novr. 1848. Returnable 1 Mon., Dec., 1848.

Bill filed "served," and (1848, Nov. 16, James Todd appears for McClellan.)

Decr. 8, 1848. Rule on defendant to answer, plead or demur to plaintiffs' bill, on the 1st Monday of January, 1849, sec. req.

Dec. 30, 1848. Affidavit filed, and time enlarged, for two months.

April 7, 1849. Answer of Sam'l McClellan filed; eo die. Answer of Margaret Carswell filed.

April 30, 1849. The cause being set down by the complainants, for argument, came on to be argued on bill and answer on the 30 April and 8 of May, 1849. C. A. V.

June 18, 1849. On motion of complainants' counsel, and on argument, ordered, that they have leave to amend the bill in the particulars stated in his motions on file.

Aug. 7, 1849. Additional interrogatories to complainants' amended bill, filed; rule on defendant, Mrs. Mary Bready, to plead, answer or demur to complainants' bill, and amended bill, on or before the first Monday of September, and upon the defendants, McClellan and Carswell, each to plead, answer, or demur to the complainants' bill, or amended, and the additional interrogatories, No. 1 and 2, in or before the first Monday of September, 1849.

Aug. 22, 1849. Answer of Mrs. Margaret Carswell to amended bill of complaint, filed.

Sept. 26, 1849. Argued and ordered by *by* the court, that Ezra

Stiles Ely be made a party to the bill, and that a subpœna issue for that purpose.

Sept. 27, 1849. Dr. Ezra Stiles Ely appears as a party defendant.

Oct. 27, 1849. Separate answer of Mrs. Bready, filed.

Dec. 15, 1849. Answer of Ezra Stiles Ely, filed.

March 5, 1850. Mrs. Bready's assent to decree for conveyance, filed.

March 8, 1850. Exceptions on behalf of Mrs. Carswell to draft of proposed decree filed.

And now, March the 9th, 1850, this case being again mentioned, and it appearing that the minute on the 2d instant was made in mistake, it is ordered that the same shall be and is considered cancelled, and that the exceptions filed by the respondent, Mrs. Carswell, to the form of decree prepared on the minutes by the counsel for complainants, shall consequently be considered as withdrawn, and the cause be considered as in the same position in which it stood prior to the first of March.

May 23, 1850. Petition of Margaret Carswell, respondent, filed.

Feby. 22, 1851. Bill dismissed as to residue; and see Eq. Minute Book, No. 1, folio, 156.

Bill of revivor, Dec. 27, 1852.

Jan'y 31, 1853. Suggestion of death of F. A. Raybold.

July 7, 1853. Appeal of G. Sharswood, one of plaintiffs, filed.

Eo die, appeal of Thomas J. Miles and wife, filed.

December Term, 1852.

GEORGE SHARSWOOD, who survived FREDERICK A. RAYBOLD, trustee of MRS. MARY ANN ELY MILES, THOMAS J. MILES, said MARY ANN ELY MILES, his wife,

*v.*

JONATHAN J. ROBINSON, executor of the last will of MRS. MARGARET CARSWELL.

George W. Biddle. L. A. Scott.

Sub. for bill of revivor. Ex. Jan'y 29, ret. 1 Mon. of Feb'y, 1853.

Jan. 29, 1853. Bill filed "served."

Feb. 4, 1853. Defendant move to quash the subpœna.

Feby. 12, 1853. Demurrer filed.

May 28, 1853. Answer filed.

June 18, 1853. The court decree that the bill is properly brought against defendant as executor.

June 22, 1853. Decree filed (see Minute book).

County of Philadelphia, *sct.*

The Commonwealth of Pennsylvania to Samuel McClellan and Margaret Carswell.

For certain causes offered before the Court of Common Pleas in and for the county of Philadelphia, we command and strictly enjoin you and each of you, that, laying all other matters aside, and notwithstanding any excuse, you and each of you personally be and appear before the judges of the said court, at a session of the same court to be holden at Philadelphia on the first day of December next, to answer concerning those things which shall then and there be objected against you, and to do further and receive what the said court shall have considered in this behalf. And have you then there this writ. And this you are in no wise to omit under the penalty of four hundred dollars.

Witness the honorable Edward King, president judge of the said court at Philadelphia, this eleventh day of November, A.D. 1848.

MICHAEL W. ASH.

Per JOHN SMITH,
Prothonotary.

Memorandum.—The above defendants are required to file their appearance in the above suit on or before the first day of December term, 1848, in the prothonotary's office; otherwise the bill will be taken pro confesso.

Served by giving a true and attested copy of the within writ to Samuel McClellan, November 12, 1848, and making known to him the contents thereof; and by leaving a like copy of the within writ at the residence of Margaret Carswell, with an adult member of the family with which she resides, November 18, 1848. So answer.

EA. LELAR,
Deputy Sheriff.

HENRY LELAR,
Sheriff.

To the honorable the Judges of the Court of Common Pleas of the County of Philadelphia, sitting in Equity.

The bill of complaint of

GEORGE SHARSWOOD and FREDERICK A. RAYBOLD, trustees of MRS. MARY ANN ELY MILES,
*v.*
SAMUEL MCCLELLAN and MARGARET CARSWELL.

And thereupon your orators complain and say, that on or about the day of A.D. 1821, one Samuel Carswell, of the

city of Philadelphia, died, seized and possessed of certain real and personal estate, having first made his will in writing, bearing date the day of September, 1821, whereby, amongst other things, he gave unto his executors, thereinafter named, and the survivors and survivor of them, three hundred shares of the testator's stock in the Bank of the United States, in trust to receive the dividends thereof, and pay thereout a certain yearly sum to the testator's son, Samuel Kinsey Carswell, during his natural life, &c., and at his decease, the said testator willed and directed that the said three hundred shares of stock, and the increase thereof, if any, should be equally divided and transferred to all said Kinsey Carswell's lawful child and children then living, and the issue of such as should be then dead, such issue to take such share only as his, her, or their deceased parent would have taken if then living, with power to his said executors to sell the said stock, or part thereof, and invest the same in other productive funds if it should be deemed more beneficial, always holding such new investment on the same trust and for the uses aforesaid. And the said testator, Samuel Carswell, appointed executors of his said last will, Ezra Stiles Ely, John Steel, and William Davidson, and the said will was duly registered and proved in the register's office of the county of Philadelphia, on the 12th day of March, 1822. And afterwards, to wit, on the sixth day of April, 1822, the said John Steel and William Davidson renounced the execution of the said will by a writing, filed in the register's office aforesaid, dated April 6, 1822, and the said Ezra Stiles Ely assumed upon himself the execution thereof, and letters testamentary were, upon the said 12th day of March, 1822, duly granted unto him. And the said Samuel Kinsey Carswell afterwards, to wit, on or about the tenth day of July, 1829, died, leaving him surviving one child born in lawful wedlock, Mary Ann Ely Carswell, now Mary Ann Ely Miles, of whom your orators are the trustees.

And afterwards, the said Ezra Stiles Ely, by an indenture of mortgage duly signed and sealed by him, and bearing date the 5th day of January, A.D. 1838, and duly acknowledged by the said Ezra Stiles Ely, and recorded in the recorder's office of the county of Marion and State of Missouri, in book E., page 457, &c., reciting, amongst other things, that the said Ezra Stiles Ely was indebted to his ward, Mary Ann Ely Carswell, in the sum of $30,000 dollars, together with interest on the same for several years past, which debt would be very considerably increased before the said ward could arrive at the period of her majority; and that the said Ezra Stiles Ely was indebted to his wards, the children of one Clement Lee Bready, lately of Philadelphia, deceased, in a sum not less than $4000; that the said Ezra S. Ely regarded the aforementioned debts as being of a peculiar character and pre-eminent claim, and in consideration of the premises, the said Ezra Stiles Ely did grant, bar-

gain, sell, and convey unto Margaret Carswell and Samuel McClellan, parties defendants to this suit, and to that individual of the two who should survive the other, and to the executors and executor and administrator and administrators of such survivors, in trust for the full payment of the aforesaid debts, all the property, real, personal, and mixed, particularly set forth and described in said indenture of mortgage, including large tracts of land in different townships in the State of Missouri, subject to the condition that if, within five years from the date of such indenture of mortgage or instrument of writing, the said Ezra Stiles Ely, or his heirs, executor or executors, administrator or administrators, or any or either of them, should pay each and every portion of the above-named debts to the aforesaid Mary Ann Ely Carswell and the heirs of Clement Lee Bready, deceased, or to their legal representatives, then and in that case the said indenture of mortgage should become void, otherwise to remain in full force.

And your orators charge the said indebtedness of $30,000, mentioned in said indenture of mortgage, to have arisen under the said testamentary trust, before stated, reposed in the said E. Stiles Ely under the will of the said Samuel Carswell, in behalf of the said Mary Ann Ely Miles.

And your orators aver, that the said indebtedness of $30,000 on the part of the said Ezra S. Ely to the said Mary Ann Ely Miles, continued during the five years following the execution of the aforesaid indenture of mortgage, and was considerably increased during said period, and still continues and exists; and afterwards, by virtue of an execution issued from the office of the clerk of the Circuit Court of the county of Marion and State of Missouri, in favor of the said Margaret Carswell and Samuel McClellan against the said Ezra Stiles Ely, certain tracts of land, a part of the premises mentioned in the aforesaid indenture of mortgage as having been conveyed to the said defendants in trust as aforesaid, was levied upon by the sheriff of said county, and by deed poll, dated the 17th day of November, A.D. 1843, and duly acknowledged and recorded in the proper office, in the said county of Marion, in book K., pages 411, 413, conveyed unto the said Margaret Carswell and Samuel McClellan in fee, and were by them thenceforth held under the like trusts as were contained in the indenture of mortgage made to them by the said Ezra Stiles Ely, before referred to, and for the purpose, amongst other things, of realizing out of the said premises, by sale or otherwise, the amount of indebtedness due from the said E. Stiles Ely to the said Mary Ann E. Carswell as aforesaid.

And your orators have reason to believe, and charge that a portion of the lands included in the said indenture of mortgage, dated January 5, 1838, being that part of the lands mentioned in the said indenture of mortgage, and not included in the said deed of 17 Nov., 1843, were allowed by the said defendants to be sold under the said

execution, or in some other way to your orators unknown, in derogation of the trusts of the said mortgage, at nominal prices, to some person or persons to your orators unknown, whereby great loss was sustained by and accrued to the said Mary Ann E. Carswell (now Miles).

And your orator further charge that all the personal property mentioned and included in the said indenture of mortgage, was allowed by the defendants in this suit, in derogation of the terms and trusts of said mortgage, to be taken by persons not entitled thereto, and particularly have reason to believe that a part thereof was allowed to be taken by the said Ezra Stiles Ely, whereby great loss was sustained by and accrued to the said Mary Ann E. Carswell (now Miles).

And your orators further charge that no steps have ever been taken by the said defendants, or either of them, since the execution of the said mortgage, and the acceptance by them of the trusts therein contained, to collect the debts recited in said mortgage as being due and owing from and by divers persons to the said Ezra S. Ely, whereby great loss has accrued to and been sustained by the said Mary Ann Ely Carswell (now Miles).

And your orators further state, that in contemplation of a marriage about to be solemnized between the said Mary Ann Ely Carswell with one Thomas J. Miles of this county, all the estate, real, personal, and mixed, of the said Mary Ann, was, by indenture bearing date the 2d day of October, A.D. 1843, recorded in recorder's office of the county of Philadelphia, in deed book R. L. L., No. 15, page 33, and made between the said Thos. J. Miles and Mary Ann E. Carswell (now Miles) and your orators, granted and conveyed to your orators, their heirs, executors, administrators, and assigns, in trust for certain purposes therein mentioned, among other things, to sell or dispose of any part of said estate, and the proceeds thereof to invest, and the income thereof to receive and pay over to the separate use of the said Mary Ann E. Miles during her life.

And the said Thos. J. Miles and Mary Ann E. Carswell (now Miles) were afterwards united in lawful wedlock, on the 2d day of October, 1843.

And your orators further aver that under proceedings instituted by them in the Orphans' Court of this county, to recover the property and sums of money held by the said Ezra Stiles Ely under the will of Samuel Carswell, deceased, for the said Mary Ann Ely Miles, a decree of the said Orphans' Court was made on the 21st day of October, A.D. 1846, which remains in full force and unappealed from, whereby the said Ezra Stiles Ely was charged with the sum of $49,861 57, as due from him, executor and trustee as aforesaid, under the will of Samuel Carswell, deceased, to your orators, as trustee of the said Mary Ann Ely Miles, no part of which said sum of money so decreed and found to be due has ever been paid by

the said Ezra Stiles Ely, although legal proceedings have been instituted against him to compel the payment of the same.

And your orators further state that as trustees aforesaid, and under the circumstances above set forth, they were authorized and entitled to demand of the said defendants what disposition had been made of the property before referred to, as held by the said defendants in trust for the said Mary Ann Ely Miles, what was its amount or present value, and what steps the said defendants or either of them had taken or intended taking in regard to its management and disposition, and your orators accordingly in the present year (1848), requested each of these defendants to give them the proper information under these heads of inquiry; and your orators had hoped that the defendants would have given to your orators the information asked for; but the defendants and each of them have, on the contrary, made evasive and unsatisfactory answers and replies to the inquiries of your orators, and have declined giving to them any information in regard to the property so held in trust as aforesaid. Your orators annex to this bill, and pray that they may be taken as part thereof, and referred to as such, copies of all the correspondence that has passed between the parties to this bill upon the matter last referred to. And your orators have reason to believe, and do believe and show unto your honors, that the said real estate so held by the said defendants in trust as aforesaid, is of great value, to wit, of at least the value of twenty thousand dollars, in addition to the personal property mentioned in said indenture of mortgage, which they charge to be of the value of at least fifteen thousand dollars; and that the said property has been wasted and mismanaged by the said defendants, and by them made altogether unproductive to the said Mary Ann Ely Miles, no part of the said indebtedness of the said Dr. Ely to her having ever been realized, liquidated, or discharged thereby, or paid thereout, or by a sale thereof, and no advantage having ever been reaped by or accrued to her directly or through your orators, her trustees, from the said property so held by the defendants in trust as aforesaid.

To the end, therefore, that the defendants may, if they can, show why your orators should not have the relief hereby prayed for, and may, upon their corporal oaths or affirmation, and according to the best and utmost of their and each of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to all and singular the several interrogatories hereinafter mentioned and set forth, that is to say:

1. Whether the said Samuel Carswell did not die seized and possessed of certain real and personal estate, having previously to his said death made his last will and testament in writing, dated day of September, 1821, and whether the said Samuel Carswell did not in and by his said last will and testament, direct, give, devise, bequeath, and appoint, as above mentioned and set forth in the stating part of this bill of complaint?

2. Whether the said will was not, on the 12th day of March, 1822, duly proved according to law in the register's office for the city and county of Philadelphia, and whether the said John Steel and William Davidson did not renounce the execution of said will, and whether letters testamentary thereupon were not granted to Ezra Stiles Ely, as set forth in the stating part of this bill of complaint?

3. Whether the said Samuel Kinsey Carswell did not afterwards, to wit, on the 10th day of July, 1829, die, leaving him surviving one child, born in lawful wedlock, Mary Ann E. Carswell (now Miles)?

4. Whether the said E. S. Ely did not, by an indenture of mortgage duly signed and sealed by him, dated the fifth day of January, 1838, and duly recorded, grant and convey to these defendants, and the survivor of them, certain property real and personal for the consideration therein mentioned, upon certain trusts and conditions therein stated, and set forth in the stating part of this bill of complaint?

5. Whether the said indebtedness of $30,000 mentioned in the said indenture of mortgage, did not arise under and by consequence and by reason of the said testamentary trusts before stated, as reposed in the said Ezra Stiles Ely, under the will of the said Samuel Carswell, in behalf of the said Mary Ann E. Carswell (now Miles)?

6. Whether the indebtedness of $30,000 mentioned in the said indenture of mortgage, did not continue on the part of the said E. S. Ely, to the said Mary Ann E. Carswell (now Miles), during the five years following the execution of said indenture of mortgage, and whether the same was not during said period considerably increased, and whether the same is not still due and unpaid, and whether the said defendants did not, by virtue of an execution issued out of the Circuit Court of the County of Marion, and State of Missouri, against the said Ezra Stiles Ely, at their suit, cause certain tracts of land, a part of the premises mentioned in the aforesaid indenture of mortgage as conveyed as aforesaid, to be levied upon and sold by the sheriff of said county, and conveyed to the said defendants in fee, by a deed dated 17th November, 1843, duly acknowledged and recorded?

7. Whether a portion of the lands included in the said indenture of mortgage, being that portion of the lands therein mentioned and not included in the said deed of Nov. 17, 1843, or whether some, and if so what portion thereof was not allowed to be sold by the said defendants or either of them, or whether their or one of their consent, privity, or connivance, under the said execution, or in some other way or mode, at nominal prices, to some person or persons, whereby the said lands so sold were sacrificed, and great loss thereby occasioned to the said Mary Ann E. Carswell (now Miles)?

8. Whether the personal property mentioned and included in the said indenture of mortgage, or some portion thereof, and if so, what

portion, was not allowed by the defendants in this suit, or either of them, to be taken by a person or persons not entitled thereto under said mortgage, and whether the library of books of the said Ezra Stiles Ely therein mentioned, and believed to be of the value of at least $6000, was not allowed by the said defendants, or either of them, to be taken and retained by the said E. S. Ely for his own use, or whether the same was not left in the possession of the said E. S. Ely, by the consent and connivance of the said defendants, or either of them, in derogation of the trusts of said mortgage, and whether the said library or a part thereof, and if so, what part is not or was not, since the suing out of said mortgage, in the possession or under the control of the said E. S. Ely or James Patterson, of Missouri (son-in-law of said Ely), or Samuel McClellan, one of the defendants in this suit, or if not in the possession or under the control of the said Ely, Patterson, or McClellan, under whose control or in whose possession the said library is, or whether all benefit or advantage to be derived from the said personal property, including the said library, by sale or otherwise, has not been wholly lost to the said Mary Ann E. Carswell (now Miles)?

9. Whether the said defendants or either of them, have or has, since the execution of the said indenture of mortgage to them, and their acceptance of the trusts thereunder, taken any steps, and if so, what steps, to collect the debts recited in the said mortgage as due and owing from divers persons to the said E. Stiles Ely, what amount of money has been realized by the defendants, or either of them, from the collection of the said debts, and whether the said debts, or any of them, if uncollected, are now in a situation for collection, or whether all or any of the said debts have not been lost, and the said Mary Ann E. Carswell (now Miles) deprived of all benefit to be derived therefrom, through the neglect of the said defendants, or either of them, to collect the same, or take the proper steps for their recovery and collection.

10. Whether the silver plate included in the said indenture of mortgage, or a portion of it, is not, or was not, since the suing out of said mortgage, to wit, on the seventeenth day of November, 1843, in the possession or under the control of E. Stiles Ely, James Patterson, (son-in-law of said Ely), or Samuel McClellan, one of the defendants in this suit; and whether the furniture included in said mortgage or a part thereof, or some other portion of said personal property; and if so, what portion is not, or was not, since the suing out of said mortgage, in the possession or under the control of the said Ezra Stiles Ely, James Patterson, or Samuel McClellan; and whether the slaves included in said mortgage, or any of them, and if so, how many, and which of them, are not, or were not, since the suing out of said mortgage, in the possession or under the control of E. S. Ely, or Jas. Patterson (his son-in-law)?

11. Whether the said defendants have not, since the date of the

last-mentioned deed, November 17, 1843, held the real estate therein mentioned under the like trusts as were contained in the aforesaid indenture of mortgage, dated 5 January, 1838, and for the purpose, among other things, of realizing out of said premises by sale or otherwise, the amount of indebtedness due from said Ezra Stiles Ely, to the said Mary Ann E. Miles, as aforesaid.

12. Whether a certain deed of trust, dated the 2d day of October, 1843, was not in contemplation of a marriage about to take place between said Mary Ann E. Carswell and one Thomas J. Miles, duly executed between said Thomas J. Miles and Mary Ann E. Carswell and the plaintiffs in this bill of complaint, whereby all the estate, real and personal, of the said Mary Ann E. Carswell, was conveyed to the plaintiffs in this suit, in trust as therein stated and set forth in the stating part of this bill of complaint; and whether such marriage was not afterwards had between the said Thos. J. Miles and Mary Ann E. Carswell, on the 2d day of October, 1843, as aforesaid.

13. Whether certain proceedings were not instituted and carried on in the Orphans' Court of this county, under which a decree was passed on the 21st October, 1846, now in full force and unappealed from, whereby the said E. S. Ely was charged with the sum of $49,861\frac{53}{100}$, as due by him, executor and trustee under the will of Samuel Carswell, deceased, to the plaintiffs in this suit, trustees of the said Mary Ann E. Miles; and whether any part of the money so decreed and found due has ever been paid by the said E. S. Ely.

14. Whether inquiries have not been addressed to the said defendants and each of them, by and on behalf of the said plaintiffs during the present year (1848), as to what disposition had been made of the property before referred to, as held by the said defendants in trust as aforesaid, as to what was its amount or value at the time of making of such inquiries, and as to what steps the said defendants, or either of them, had taken, or intended taking, in regard to its management or disposition; and whether the said defendants, and each of them, did not make evasive and unsatisfactory replies to the above stated inquiries, and declined giving to the plaintiffs any information in regard to the property so held by them in trust as aforesaid, and whether the copies of the correspondence upon the subject referred to in this interrogatory annexed to the plaintiff's bill, are not true and exact copies of the correspondence that took place upon the subject herein referred to.

15. Whether the said property so held by the said defendants in trust as aforesaid, under the indentures of mortgage, dated 5 January, 1838, and the deed to them dated 17 Nov. 1843, has not been wasted and mismanaged by the said defendants, and made altogether unproductive to the said Mary Ann E. Miles; and whether any part of the said indebtedness of the said E. S. Ely to the said Mary Ann E. Miles has ever been realized, liquidated, or discharged thereby or paid out of the said property, or by a sale thereof; and whether any

advantage has ever accrued to the said Mary Ann E. Miles, directly or indirectly, from said property so held by the said defendants in trust, as aforesaid.

And that an account may be taken of all and every the said trust property, effects, and moneys, that have since the execution of the said indenture of mortgage and the said deed of 17 Nov. 1843, been received by the said defendants, or either of them, trustees, as aforesaid; and also all moneys received by said defendants, or either of them, from the sale of the real estate mentioned in the said mortgage or deed of trust, or from a sale of any of the property therein mentioned, real, personal, or mixed, if any sales thereof have been made by the said defendants, or either of them; and also an account of the application thereof, and that the amount of all such moneys, if any remains in the hands of the said defendants, or either of them, as aforesaid, may be ascertained, and they, or he, or she, may be decreed to pay what shall appear to be due from them, or either of them, on such account.

And that the said defendants may be removed and dismissed from being trustees under the said mortgage and said deed of 17 November, 1843, and that this honorable court appoint the plaintiffs in this suit, or some other person or persons, to be the trustee or trustees under the said mortgage and said deed of 17 Nov. 1843, instead: and that the said defendants may make, execute, and deliver unto the plaintiffs in this suit, or such other person or persons as may be appointed trustee or trustees as aforesaid, by this honorable court, in trust for the uses and purposes mentioned in the said mortgage, and for the purpose of raising by sale or otherwise, the amount of the indebtedness due from the said E. S. Ely to the said M. A. E. Miles, a conveyance of the lands mentioned in the said deed of 17 Nov. 1843, and of all their, and each of their right, title, interest, trust, claim, property, and demand of, in, and to the same; and also that the said defendants, assign, transfer, hand over, and deliver to the said plaintiffs, or to such person or persons as may be appointed trustees for this purpose, all and every the trust property and effects, of whatsoever kind in character, whether real, personal, or mixed, received and held by the said defendants, or either of them, under the said mortgage of 5 January, 1838, and said deed of 17 November, 1843. And that your orators may have such other or further relief in the premises, as the nature of the circumstances of this case may require, and to your honors shall seem meet.

May it please your honors to grant unto your orators a writ of subpœnas directed to the said Saml. McClellan and Margaret Carswell, thereby commanding them, and each of them, at a certain day and under a certain penalty to be therein limited, personally to be and appear before the honorable court, and then and there, full, true, direct, and perfect answer make to all and singular, the premises; and further, to stand, to perform, and abide such further order, di-

rection and decree therein as to your honors shall seem meet; and your orators will ever pray, &c.

GEO. W. BIDDLE,
Of Counsel with Plaintiff.

November 11, 1848.

NOTE.—The defendants, Saml. McClellan and Margaret Carswell, are each required to answer all the foregoing interrogatories, numbered respectively, 1 to 15 inclusive.

Indorsed: December Term, 1848. 2 Com. Pleas. In Equity. Sharswood et al. *v.* McClellan et al. Nov. 11, 1848. Sub. ex. to D. 48. No. 1. Bill in equity. Issue subpœna our bill, retrnble to 1st Mon. Dec. 1848. Geo. W. Biddle, solicitor for pltffs. Nov. 11, 1848. Jno. Smith, Esq., P. C. P.

*Copies of Correspondence referred to in Bill, and in the Fourteenth Interrogatory thereof.*

PHILADELPHIA, 29th April, 1848.

Dr. SAMUEL MCCLELLAN.

Sir: I beg leave on behalf of Messrs. Sharswood and Raybold, trustees of Mrs. Mary Ann E. Miles, to address you, as co-trustee with Mrs. Margaret Carswell, under a certain mortgage or deed of trust made by Dr. Ezra Stiles Ely, on January 5th, 1838, upon the subject of the property so conveyed to you in trust.

The magnitude of my clients' interest, representing as they do a claim of over $50,000, under a decree of the Orphans' Court of this county against Dr. Ely, makes it highly important that they should possess early and definite information in regard to the property thus held by yourself and co-trustee.

Will you oblige me by informing me what distribution has been made of the property referred to, or of any portion of it? what is its amount and probable present value, if undisposed of? and what step yourself and co-trustee have taken, or intend taking, in regard to its management and disposition?

An early answer from you upon these points of inquiry, will confer a favor upon

Yours, respectfully,
GEORGE W. BIDDLE.

PHILADELPHIA, May 3, 1848.

GEORGE W. BIDDLE, Esq.

Sir: James Todd, Esquire, is now out of town, on account of the death of his son, David Todd, Esq.; but, so soon as he shall return, I beg to refer you to him for an answer to your note of the 29th ultimo.

Yours, respectfully,
SAMUEL MCCLELLAN.

47 South Fifth Street, 8th May, 1848.

Dear Sir:

I addressed a note on the 29th ultimo to Dr. Samuel McClellan upon the subject of the lands in Missouri, conveyed by Dr. Ely to him and Mrs. Carswell, in trust for Mrs. Miles, and was requested by him to refer to you for an answer, upon your return to the city.

Will you do me the favor to let me hear at an early day from you in reply to the inquiry made of Dr. McClellan, and in so doing oblige,

Very respectfully, yours,

GEORGE W. BIDDLE.

James Todd, Esq.

Dear Sir:

I this morning received your note in relation to the Missouri lands, mortgaged by Dr. Ely to Dr. S. McClellan and Mrs. Carswell, and am instructed to write in reply, "That Mr. Miles has the deed of the property bought under mortgage by Dr. McClellan and Mrs. Carswell; you are also respectfully referred to the records of the court in Missouri, as to what was done with the other property that formerly belonged to Dr. Ely. I am also instructed to say to you that Dr. McClellan cannot say what the property held by him and Mrs. Carswell would sell for, either in Missouri or in this city." I regret that it is not in the power of my clients to be more definite.

Very respectfully,

JAMES TODD.

May 8th, 1848.

George W. Biddle, Esq.

47 South Fifth Street, 9th May, 1848.

Dear Sir:

Your note of to-day, in answer to mine of yesterday, has been duly received.

I can view your reply in no other light than as the manifestation of an intention on the part of your clients, Dr. Samuel McClellan and Mrs. Carswell, to withhold all proper information from the parties interested in the deed of trust of 5th January, 1838.

My clients will consequently adopt the course that the law points out to them in the premises.

I have also to state on behalf of Mr. Thomas J. Miles, that he has not in his possession the deed of the property bought under mortgage by Dr. McClellan and Mrs. Carswell.

I am very respectfully,

GEORGE W. BIDDLE.

James Todd, Esq.

47 South Fifth Street, 26th May, 1848.

Mrs. Margaret Carswell.

Madam: At the request and by authority of Messrs. Sharswood and Raybold, trustees of Mrs. Mary Ann E. Miles, I beg leave to address you as co-trustee with Dr. Samuel McClellan, under a deed

of trust from Dr. Ely, dated January 5, 1838, upon the subject of the trust property.

My clients representing a decree under the Orphans' Court of this county against Dr. Ely, of over $50,000, are most anxious to obtain definite information in regard to the trust property referred to. Will you oblige them by stating what disposition has been made of the property thus conveyed to you, or of any portion of it? what is its amount and probable present value if undisposed of? and what steps yourself and co-trustee have taken, or intend taking, in regard to its management and disposition?

An early answer upon these points will confer a favor upon,

Very respectfully yours,

GEORGE W. BIDDLE.

DEAR SIR:

Mrs. Carswell has sent me your note to her of the 26th instant. Mrs. Carswell has been for many years in infirm health, and removed from all active participation in matters of business; she is not aware that she ever saw the deed to which you refer, stated to be from Dr. Ely, in January, 1838, to Dr. McClellan and herself.

I presume from your note that the deed, or a copy of it, must be in possession of Messrs. Sharswood and Raybold, or one of them, and will be obliged to you to let me see it.

I am very respectfully yours,

J. M. SCOTT,
For Mrs. Carswell.

George W. Biddle, Esq.

47 SOUTH FIFTH STREET, June 2d, 1848.

DEAR SIR:

I have received your note on behalf of Mrs. Carswell, in reply to mine to her of the 26th ult.

We have not the original deed of trust referred to, but supposed it was in the possession either of Dr. McClellan or of Mrs. Carswell. I send you, however, a copy, which is at your service.

Will you be kind enough to return it to me when you have done with it, as it is the only copy we possess.

I am very respectfully yours,

GEORGE W. BIDDLE.

John M. Scott, Esq.,
Counsel for Mrs. Carswell.

*Rule to answer, plead, or demur.*

Common Pleas. In Equity, December Term, 1848. No. 2.

SHARSWOOD and REYBOLD
*v.*
McCLELLAN and CARSWELL.

The prothonotary will please enter a rule in the above case, upon

each of the above defendants. to answer, plead, or demur to plaintiffs' bill, on the first Monday of January, 1849. Sec req.

GEO. W. BIDDLE,
Solicitor of Plaintiff.

A. W. Olwine, Esq.,
P. C. P.

Dec. 8, 1848.

Indorsed, Com. Pleas, D. 48. 2. In Equity. Sharswood et al. *v.* McClellan et al. Filed Dec. 8, 1848. Rule to answer, &c.

*Affidavit of Mrs. Margaret Lamb, &c.*

Common Pleas, No. 2, to Dec. 1848. In Equity.

SHARSWOOD and REYBOLD
*v.*
McCLELLAN and CARSWELL.

Margaretta Lamb, of the city of Philadelphia, being duly affirmed, says, that she is well acquainted with Mrs. Margaret Carswell, being her daughter; that the said M. Carswell is nearly eighty years of age, in infirm health, and with a capacity for business such as is naturally suited to her age; that Mr. Jonathan J. Robinson, her son (she having been twice married), usually attends to her affairs, and is the customary medium of communication with her counsel; that he has been absent, and out of the State of Pennsylvania for more than a month last past, and is expected to return now from week to week.

MARGARETTA LAMB.

Affirmed and subscribed before me, December 30th, A. D. 1848.

JNO. THOMPSON,
Alderman.

Indorsed: C. P. In Equity, 2 Dec. 1848. Sharswood *v.* McClellan. Affidavit of Margaretta Lamb. Time enlarged to answer, for two months, Dec. 30, 1848. Filed Dec. 30, '48.

To the Honorable the Judges of the Court of Common Pleas of the City and County of Philadelphia, sitting in Equity.

The answer of Samuel McClellan, M.D., one of the defendants to the bill of complaint of George Sharswood and Frederick A. Raybold, trustees of Mrs. Mary Ann Ely Miles *v.* Samuel McClelland and Margaret Carswell.

This defendant, now and at all times hereafter, saving and reserving unto himself, all and all manner of benefit and advantage of exception, that can or may be had or taken to the many errors, un-

certainties, insufficiencies, and other imperfections, in the said complainants' bill of complaint contained, for answer hereto, or unto so much thereof as this defendant is advised is material or necessary for him to make answer unto, answereth and saith, that he believes it to be true that Samuel Carswell, of the city of Philadelphia, in the said bill of complaint mentioned, died on the 17th day of February, A. D. 1822, seised and possessed of certain real and personal estate, having first made his will in writing, dated the day of September, 1821, whereby amongst other things, he gave unto his executors thereinafter named, and the survivors and survivor of them, three hundred shares of the testator's stock in the Bank of the United States in trust, to receive the dividends thereof, and pay thereout a certain yearly sum to the testator's son, Samuel Kinsey Carswell, during his natural life, &c. And at his decease, the said testator willed and directed that the said three hundred shares of stock, and the increase thereof, if any, should be equally divided and transferred to all said Kinsey Carswell's lawful child or children then living, and the issue of such as should be then dead; such issue to take such share only as his, her, or their deceased parent would have taken if then living; with power to his said executors to sell the said stock or part thereof, and invest the same in other productive funds, if it should be deemed more beneficial; always holding such new investment on the same trust and for the same uses aforesaid; and the said testator appointed executors of his last will, Ezra Stiles Ely, John Steel, and William Davidson, and the said will was duly registered and proved in the register's office of the county of Philadelphia, on the 12th day of March, A.D. 1822; and afterwards, to wit, on the 6th day of April, A. D. 1822, the said John Steel and William Davidson renounced the execution of the said will, by a writing filed in the register's office aforesaid, dated April 6th, 1822; and the said Ezra Stiles Ely, assumed upon himself the execution thereof, and letters testamentary were upon the 12th day of March, 1822, duly granted unto him; and the said Samuel Kinsey Carswell, afterwards, to wit, on or about the tenth day of July, 1829, died, leaving him surviving one child, born in lawful wedlock, Mary Ann Ely Carswell, now Mary Ann Ely Miles, having previous to his death, to wit, on the 14th day of June, A.D. 1829, by his last will and testament, proved July 16th, A.D. 1829, a copy of which is hereto annexed, and which this defendant prays may be taken for a part of this answer, nominated and appointed the said Ezra Stiles Ely, guardian of the property of the said Mary Ann, and after the decease of the said Mary Ann's mother, guardian as well of the person, as of the property, of the said Mary Ann.

And this defendant further saith, that previous to the date of the mortgage referred to in the complainants' said bill, to wit, on the 22d day of November, A. D. 1837, the said Ezra Stiles Ely executed a deed of trust to this defendant and the said Margaret Cars-

well, of all the property mentioned in the said mortgage, as this defendant is informed and believes, under which deed of trust, authority was reserved to the said Ezra Stiles Ely to act as agent and attorney in fact of the said Margaret Carswell, and of this defendant, in disposing of the said property (real, by consent of at least one of the said trustees, and personal, at his own discretion) in payment of any or all his debts then due; and in case the said Ezra Stiles Ely should not pay all his said debts before the first day of January, A. D. 1842, then the said Margaret Carswell and this defendant were authorized, without the consent of the said Ezra Stiles Ely, to sell all said Ezra Stiles Ely's real and personal estate, and to pay each of his creditors in full, or if that could not be done, pay each a ratable proportion. This deed of trust was duly acknowledged and recorded, in Palmyra, in Marion County, Missouri, 1837, all which will more fully appear by the said deed, to which this defendant respectfully refers, a copy whereof is hereto annexed, which this defendant prays may be taken as part of his answer.

Under this deed of trust, as this defendant has been informed and believes, the said Ezra Stiles Ely went on to dispose of property, both real and personal, and to pay debts, of all which this defendant had at the time no knowledge whatsoever, nor did he know of the existence of such deed of trust until some time after its execution, and even then had no particular knowledge of its contents, having never seen the deed until the said complainants' bill was filed. In all these transactions this defendant left everything in the hands of the said Ely, and the only act of this defendant in any manner connected therewith, was the giving to the said Ely a general power of attorney, to settle all this defendant's business in the State of Missouri.

At the date of which (October 15th, A.D. 1840), this defendant was entirely ignorant of the existence of the mortgage referred to in the said complainants' bill, his attention having been called to it by a letter from the said Ely, received some time in October, A.D. 1843, at or about which time this defendant received a letter from David C. Tuttle, Esq., counsellor at law (as this defendant is informed and believes), advising the sale of the property, included in the said mortgage, to secure it for the benefit of the parties interested therein; agreeably to which advice, this defendant joined with the said Margaret Carswell in an order, dated the ninth of October, A.D. 1843, directing the sale of the said mortgage property, under a judgment which had been previously confessed in favor of the said Margaret Carswell and of this defendant, by the said Ezra Stiles Ely, as this defendant was then informed. And this defendant at the same time gave directions to purchase in trust for the creditors, according to the mortgages, all the property which might otherwise be sacrificed at the sale; in pursuance of which order the mortgage property was (as this defendant is informed and believes)

sold, and bought in by the said Daniel C. Tuttle, Esq., and a deed made by J. J. Montgomery, then sheriff of the said county of Marion, to Margaret Carswell aforesaid and this defendant, which deed was sent on by mail, and afterwards sent by this defendant to F. A. Raybold, Esq., one of the said complainants, and has not yet been returned by him to the defendant, but has been (as this defendant has been informed and believes) recorded in Marion County, Missouri. And this defendant, except as above stated, in no way interfered with the property mentioned in the said mortgage, nor did he ever receive any personal advantages therefrom, nor did he in any other manner, except or act under the trust created in said mortgage, and is ready to assign whatever interest, if any he may be adjudged to have therein.

And this defendant further saith, that as regards the indebtedness of the said Ezra Stiles Ely in the said mortgage mentioned, he has no personal knowledge, or whether it was increased or diminished during the five years, but has been informed that a large amount has been found due from the said Ely, as appears by the decree of the Orphans' Court, set forth in the complainants' bill.

And this defendant further saith, that he gave no directions in relation to the mortgaged premises, except that before stated, nor does he know whether any of the mortgaged lands were sold in derogation of the trusts mentioned in the said mortgage, nor did he ever authorize or consent to any such sale. His first knowledge of the mortgage was in 1843, and if any of the property, real or personal, in the said mortgage mentioned, was improperly disposed of, it was without his knowledge or consent. Of the particular contents of the said mortgage this defendant is ignorant, having never seen it, nor in any way accepted of the trusts therein imposed upon him, except as above stated and set forth; and he has no particular knowledge of the debts in the said complainants' bill mentioned, nor did he ever take any steps to collect them.

And this defendant admits the deed of trust made previously to the marriage in the said complainants' bill mentioned, and that the marriage subsequently took place, and that so far as he is informed, the proceedings of the Orphans' Court in the said complainants' bill mentioned are true.

And the said defendant further saith, that the statements in the said complainants' bill in regard to inquiries made by them of him concerning the mortgaged property are true, as also the correspondence therein referred to; but he denies giving evasive answers, or withholding any information which it was in his power to communicate.

And the said defendant further saith, that of the value of the real and personal estate in the said complainants' bill mentioned, he is wholly ignorant, and *utterly denies wasting or mismanaging said property.*

In relation to the interrogatories to him in the said complainants' bill propounded this defendant answers and says, that from hearsay, having no personal knowledge on the subject, he believes that the first, second and third interrogatories should be answered in the affirmative, and he so answers them accordingly.

To the fourth interrogatory, this defendant answers, that he did not know at the time, nor for a long time after the date, January 5th, 1838, that Dr. Ely had executed the indenture of mortgage bearing that date; nor is this defendant aware that he has ever seen it, even to this day; nor did he, so far as he has knowledge and belief, ever in any way or at any time, accept and assume the responsibility of the trusts mentioned in said mortgage, otherwise than he may be by implication thought to assume them by ordering sale under the judgment confessed October 9th, 1843, upon the mortgage as above stated, which he did at the request of the said Ezra Stiles Ely, and by the advice of counsel, merely to protect the rights of said Ely's wards. That the said Ely executed the mortgage in the said complainants' bill mentioned, this defendant believes from information.

To the fifth interrogatory, this defendant answers, that it is his belief, that whatever may be the past or present indebtedness of the said Ezra Stiles Ely to his late ward, Mary Ann Ely Miles, such indebtedness resulted from the bequest of three hundred shares of bank stock as stated in said complainants' bill.

To the sixth interrogatory, this defendant answers, that he has no other knowledge of the said Ely's indebtedness than that hereinbefore stated in this answer; and that this defendant and the said Margaret Carswell, and by virtue of an execution issued out of the Circuit Court of Marion County, in the State of Missouri, against the said Ely, caused certain tracts of land to be sold, bought in and conveyed to them, as will appear by a deed from Jordan J. Montgomery, Esq., executed November 11th, 1843, and which was, as this defendant believes, truly acknowledged and recorded.

To the seventh interrogatory, this defendant answers, that no part of the lands included in this mortgage deed of January 5th, 1838, were, on the seventeenth of November, 1843, or at any other time, by his knowledge, privity, connivance, or consent, prevented from being sold, or sold at nominal prices to any person or persons, and thereby satisfied, but said defendant and the said Margaret Carswell jointly directed the said attorney to have all the mortgaged property sold, or so much thereof as might be necessary to meet the amount for which the said Ely had confessed judgment, as above mentioned.

To the eighth interrogatory, this defendant answers, that no portion of the personal property included in said indenture of mortgage was permitted by him to be taken by any person or persons not entitled thereto under said mortgage, whether such property consisted of

books or otherwise; that this defendant has not allowed the said Ezra Stiles Ely, or any other person to take charge of or use any of the trust property which could be found, since the order for the sale thereof was given on the 9th of October, 1843, and that he knows nothing of the library, except that he has heard and believes that one William Muldrow, by process of law, obtained possession of the most valuable part of it, and other persons, of other portions. Under whose care or control the said library may now be this defendant is unable to say. That the benefit or advantage of such personal property included in the said indenture of mortgage as has thus parted from the possession of the said Ezra Stiles Ely, has been necessarily lost to the said Mary Ann Ely Miles, this defendant presumes. Further, in answer to the interrogatory, this defendant thinks proper to state that in the year 1836 he became possessed of a considerable portion of what was then the library of the said Ezra Stiles Ely, which was conveyed to him by the said Ely to secure a debt, the nature of which was as follows. The United States Bank has a judgment against this defendant, for the sum of four thousand dollars, principal and interest, for a debt of said Ely, for which this defendant became responsible to the bank by giving his note. These books this defendant has loaned to said Ely on condition of their being, at all times, subject to this defendant's order.

To the ninth interrogatory, this defendant answers, that neither has he, nor so far as he knows and believes, has his co-defendant, taken any charge of the personal property included in said mortgage, or collected any debts or received any money whatsoever on account of the same. He has been informed and believes, that many of these debts are collectable; that said Ely, under the deed of trust dated November 22d, 1837, has collected such of them as he could; and that none of said debts or personal property of any kind has been lost through negligence of this defendant, nor so far as he knows and believes, of his co-defendant.

In the tenth interrogatory, this defendant answers, that neither the silver plate included in the said indenture of mortgage, nor any part thereof, has been, so far as this defendant knows and believes, under the control of the said Ezra Stiles Ely, James H. Patterson, or this defendant, since the suing out of said mortgage, nor have the furniture or slaves, included as above, been, so far as this defendant knows and believes, under such control. Of the disposal of the personal property, since this mortgage was sued out, this defendant knows nothing.

In the eleventh interrogatory this defendant answers in the affirmative.

To the twelfth interrogatory this defendant answers in the affirmative.

To the thirteenth interrogatory this defendant answers that he

believes such decree was passed by the Orphans' Court, and that no money has been paid under it.

To the fourteenth interrogatory, this defendant answers, that he believes such correspondence to have taken place, as inquired by said complainants; but this defendant denies giving evasive answers, and avers that he always answered truly and clearly, according to the best of his knowledge and belief.

To the fifteenth interrogatory, this defendant answers, that the property held in trust by the defendants has not been wasted or mismanaged; but he has been informed and believes, that if disposed of according to its real value, it would discharge all the debts for the payment of which it was intrusted to these defendants.

And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by this said bill charged, without this that there is any other matter, cause, or thing in the complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, avoided, traversed, or denied, is true, to the knowledge or belief of this defendant. All which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and hereby prays to be hence dismissed, with his reasonable costs and charges in his behalf most wrongfully sustained.

JAMES TODD,
For Samuel McClellan.

Samuel McClellan, being duly sworn according to law, saith, that the facts set forth in the above answer, so far as the same are stated on his own knowledge, are true; and so far as the same are stated on the knowledge or information of others, he believes them to be true.

SAMUEL McCLELLAN.

Sworn and subscribed before me, February 10th, 1849.

THOMAS D. SMITH,
Alderman.

Know all men by these presents, that I, Samuel K. Carswell, of the city of Philadelphia, do make this my last will and testament; that is to say, I give all my estate, after my debts are paid, and funeral charges, to my wife Elizabeth, and I appoint the Rev. Ezra Stiles Ely, D.D., of Philadelphia, executor of this my last will; and I request that my wife Elizabeth may be the guardian of our infant daughter's person as long as my wife shall remain my widow; while I nominate and appoint the said Ely to be the guardian of the property of my said daughter Mary Ann. And if my wife shall decease, or marry again after my decease, then I wish the said Ely to be guardian both of the person and property of said daughter.

Done at Holmesburg, Pa., this fourteenth day of June, A.D. 1829.

SAMUEL K. CARSWELL.

Witnesses present,
JOHN ROBINSON,
MARGARET CARSWELL.

PHILADELPHIA, July 16th, 1829.

There personally appeared John Robinson and Margaret Carswell, the subscribing witnesses to the foregoing will, and on their solemn oaths, according to law, did depose and say, that they were present, and did see and hear Samuel K. Carswell, the testator in the foregoing will named, sign, publish, and declare the same as and for his last will and testament; and that at the closing thereof he was of sound mind, memory, and understanding, to the best of their knowledge and belief.

Coram. JOHN B. SEWALL,
Deputy Register.

Philadelphia City and County.

I certify the foregoing writing to be a true copy of the original last will and testament of Samuel K. Carswell, as well as the probate thereof, as filed and of record in the register's office of the city and county of Philadelphia.

Given under my hand and seal of office, this 3d day of Oc-
[SEAL.] tober, A.D. 1829.

JOHN B. SEWALL,
Deputy Register.

*Copies of Deeds referred to in the case.*

Deed of Trust made and executed by Ezra Stiles Ely, D.D., to Margaret Carswell, widow, and Samuel McClellan, M.D., Nov. 22d, A.D. 1837.

Whereas, the government of these United States of America, by their unwise hostility to the late and present Bank of the United States, located in the city of Philadelphia, and by other ruinous measures, have so disturbed the ordinary course of business, destroyed confidence, cramped enterprise, and dispelled from circulation the ordinary currency of the county, that said government cannot pay its own debts, but has retracted some of its engagements, and resorted to the expedient of issuing treasury notes, payable a year after date; whereas the banks throughout our country have, for an indefinite time, suspended the payment of their own notes, except by other notes of banks, individuals, or the treasury of the

United States, and have in many instances emitted post-notes, payable twelve months after date; whereas nearly half of the most prudent, respectable, and extensive merchants in the great cities of New York and Philadelphia have either become bankrupt or have been compelled to obtain an extension of the time appointed for the discharge of their debts; and whereas the subscriber is in these distressing times indebted to several individuals, some of whom might, by sacrificing his property to pay themselves, prevent him ultimately from doing justice to all his creditors.

Now, therefore, know all men by these presents, that in consideration of the premises, as also of ten dollars to me in hand paid, at the time of ensealing this instrument of writing, I, Ezra Stiles Ely, of Marion County, in the State of Missouri, have bargained, sold, transferred, and assigned to Margaret Carswell, widow, of the aforesaid Marion County, and to Samuel McClellan, M.D., of the city of Philadelphia, in the State of Pennsylvania, the following described real and personal property, to be by them as tenants in common, and not joint tenants, held, possessed, and disposed of in trust, in the manner and for the purposes hereinafter prescribed and ordained, to wit:

The northwest quarter of the northeast quarter of section No. twenty-five, in township No. fifty-seven north, in range No. eight west of the fifth principal meridian, sold by the United States agreeably to certificate No. 8703, and conveyed by Jacob Earnest to E. S. Ely, for $75.

The southwest quarter of section seven, in township fifty-eight, of range seven west, in the district of lands subject to sale at Palmyra, Missouri, containing 162 acres, patented by John Roche, by certificate No. 3713, and by said Roche conveyed to E. S. Ely; (cost $1440).

The southeast quarter of the southeast quarter of section No. twenty-six, the west half of the southeast quarter of section No. twenty-six, the east half of the northeast quarter of section No. twenty-seven, the west half of the southwest quarter of section No. twenty-six, and the west half of the northwest quarter of section No. thirty-six, township No. fifty-seven north, in range No. seven west, in the district of lands sold by the United States at Palmyra, containing three hundred and sixty acres, conveyed by John Moss, jr., to E. S. Ely, for the sum of $1500.

The east half of the southwest quarter of section No. thirty-three. in township No. fifty-eight north of range No. five west, in the district of lands sold by the United States at Palmyra, Missouri, which S. W. B. Carnegy conveyed to E. S. Ely for $275.

One hundred and forty-two lots, in Marion city, in Marion county, conveyed to E. S. Ely, by deed of John McKee and wife, recorded in Deed Book D., pages 397 and 398, in the proper office at Palmyra.

Fifty-six lots in Marion city aforesaid, conveyed to E. S. Ely, Urial Wright and wife, by deed, recorded in the proper office, at Palmyra, in Deed Book E., page 1.

Ten lots in Marion city aforesaid, bought of John M. Hood, and conveyed to E. S. Ely by Wm. Muldrow by deed, recorded in Deed Book E. pages 136, &c., in the proper office, at Palmyra.

All the right and title of Ezra Stiles Ely to an equal undivided lot, in Marion city, and in all the buildings thereon erected.

The east half of the northeast quarter of section No. seventeen, in township No. fifty-eight north of the base line, in range No. five west of the fifth principal meridian, containing 80 acres.

The fractional section No. twenty-two, in township No. fifty-nine north of the base line, in range No. five west of the fifth principal meridian.

The southeast fractional quarter of section No. twenty-eight, in township No. fifty-nine north of the base line, in range No. five west of the 5th principal meridian, together with the frame dwelling-house and the frame store-house thereon erected.

The west half of the section No. twenty-eight, in township No. fifty-nine north of the base line, in range No. five west of the 5th principal meridian, containing 320 acres.

The east half of the northwest quarter of section No. ten, in township No. fifty-six north of the base line, in range No. six west of the fifth principal meridian, except ten acres of the same sold to Gerard.

The northwest quarter of the northeast quarter of section No. ten, in township No. fifty-six north of the base line, in range No. six west.

The southwest quarter of section No. three, in township No. fifty-six north, in range No. six west of the fifth principal meridian.

The east half of the southeast quarter of section No. four, in township No. fifty-six north, in range No. six west.

The west half of the southeast quarter of section No. four, in township No. fifty-six north, in range No. six west, which James P. McElroy sold to E. S. Ely for $320, in 1835.

The northwest quarter of section No. three, and the northeast quarter of section No. four, and the east half of the northwest quarter of section No. four, in township No. fifty-six north, in range No. six west, which Bird and others conveyed to E. S. Ely for $2800.

The east half of the southwest quarter, and the east half of the southeast quarter, and the southwest quarter of the southeast quarter of section No. thirty-three, in township No. fifty-seven, north of the base line, in range No. six west, which 200 acres, with the house thereon, cost E. S. Ely $1600.

The north half of section No. thirty-three, in township No. fifty-seven north, in range No. six west, and the west half of the northwest

quarter of section No. thirty-four, in the same township and range, which, with the houses thereon erected, and other improvements made, cost E. S. Ely $4370; seventeen acres of this tract, sold to Eaton & Baldwin for $700, being excepted from this conveyance.

All those 447 acres of land, except 5 sold by the subscriber to J. C. Beatty, 5 to Alexander J. Dallas, and 5 to Benjamin Pyatt, situate in section 20 and 21, in township No. 57 north, in range 6 west, which Rodes Gentry, by deed, recorded in Deed Book C, pages 417 and 418, conveyed to the subscriber, together with the old log houses, the new frame house, and the barn thereon erected, with all the appurtenances of the same, subject only to a mortgage for 2886 dollars, lately executed to the Rev. James Gallaher, to secure the payment of that sum, together with 8 per cent. interest; sixty acres of land, more or less, remaining unsold in the tract which James Thomas, by deed, recorded in Deed Book C., page 405, in the recorder's office in Palmyra, sold to the subscriber on the nineteenth of August, 1835, together with the two new frame two story houses thereon erected, which lot and houses cost $2400. The northeast quarter of the northeast quarter of section No. 29, in township No. 57 north, in range No. 6 west, containing 40 acres, which Charles Moffitt and Robert Moffitt conveyed to the subscriber August 28, 1835, agreeably to the deed recorded in the proper office, in Deed Book C., pages 412 and 413; the west half of the southwest quarter of section No. 16, in township No. 57 north, in range No. 6 west, which Elisha Baldwin, Faithy Baldwin, and James Thomas conveyed to the subscriber, August 19th, 1835, for $366, agreeably to deed recorded at Palmyra, in Deed Book C., pages 402 and 403; all that certain lot of ground, together with two log and two frame houses thereon erected, situate and known as the west half of the southeast quarter of section No. 23, in township No. 56 north, in range No. 6 west of the fifth principal meridian; all the right, title, and interest of the subscriber in and to an equal undivided half of that steam saw and grist mill, situate in Ralls county, and known as "the Ely McKee Mill," and to a lot of 80 acres of ground whereon said mill, together with several other buildings are situated, known as the northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter of section No. 26, in township No. 56 north of the base line in range No. 6 west of the 5th principal meridian, which lots of 40 acres each were conveyed to E. S. Ely and John McKee, as tenants in common by Morton & Hall and others; an equal undivided fifth part in that tract of land in Ralls county, containing sundry remarkable salt sulphur springs, together with sundry buildings thereon erected, known as the east half of the southeast quarter of section No. 26, the east half of the northeast quarter of section No. 35, the west half of the northwest quarter of section No. 36, and the west half of the southwest quarter of section No. 25, in township No. 56 north, in range No. 6 west, which tracts of land contain 320 acres, one-fifth part of which was conveyed to

the subscriber by Moses D. Bates and wife, as will appear by deed, recorded in the office at New London, in Deed Book B., pages 405 and 406, all that certain lot of ground, containing ten acres, lying in a piece 20 rods wide from east to west, and 80 rods deep from north to south, which is situate on the west side of the northeast quarter of the southeast quarter of section No. 34, in township No. 57 north of the base line, in range No. 6 west of the 5th principal meridian, which lot of land John McKee and wife, and Samuel Muldrow conveyed to the subscriber by deed duly recorded at Palmyra. The northwest quarter of section No. 31, in township No. 56 north, in range No. 7 west, which Joshua Gentry and wife conveyed to E. S. Ely, for $1200. The northwest quarter of section No. 36, in township No. 56 north, in range No. 8 west, together with three log houses thereon erected, which Joshua Gentry and wife, and Edmund Rutter, jr. and wife, agreeably to deeds recorded in Monroe county, in Deed Book B., pages 439 and 443, conveyed to the subscriber, who has granted a pre-emption right to John Eustane and to Samuel Dunnahower, for the same, to which this grant in trust is declared to be subject; the southeast section No. 28, in township No. 56 north, in range No. 7 west, which the subscriber bought of Wm. Delany for $960, and to which E. S. Ely has granted a pre-emption right on certain terms to Joseph M. Hampton, to which terms this deed of trust is declared to be subject. The southeast quarter of the southwest quarter of section No. 31, and the southwest quarter of the southeast quarter of section No. 31, in township No. 56 north, in range No. 6 west, which Franklin Bowles conveyed to the subscriber, and a pre-emption right to which has been granted to James Boggs, on certain terms, to which this deed of trust is hereby declared to be subject. A certain tract of land in Marion county, centaining 12 acres and one-tenth of an acre, and two brick houses, with their appurtenances thereon erected, which Daniel Bradley and Hannah his wife conveyed to the subscriber for $2100, on the 2d May, 1835, as will appear from deed, recorded in Deed Book C., pages 327 and 328, in the proper office at Palmyra; two certain lots of land, lying in the town of Palmyra, together with the houses thereon erected, known as lots No. 5 and 6, in block No. 26, in the plat of said town, which John C. Pickett and wife sold to the subscriber for $400, Sept. 9th, 1835, agreeably to deed recorded in the proper office at Palmyra, in Deed Book C., pages 423 and 424. Three certain lots of land in Palmyra, in Marion county, Mo., together with all the buildings thereon erected, known in the plat of Dickerson's addition to the town of Palmyra as lots Nos. 4, 5, and 6, in block No. 47, which John K. Fergueran and wife, on the 19th September, 1835, sold to the subscriber for $700, a debt due from Samuel C. Ely, M.D., of $500, secured by a mortgage deed in the county of Ralls, in the proper office, in Deed Book C., 280 and 281. A debt due from Paul Hunter, of $400, be the same more or less, secured

by mortgage deed recorded in the proper office in Palmyra, in Deed Book C., pages 162 and 163. A debt due from Robert J. Smith, of $585 50, secured by mortgage intended to be duly recorded at Palmyra. A debt of $500, due from Wm. R. Downing, secured by mortgage intended to be recorded in the proper office at Palmyra. An unsettled claim against the trustees of Marion College in Missouri, believed in equity to amount to $15,000, be the same when finally adjusted, more or less. One colored servant man, named Ambrose; one colored servant woman, named Milinda; one colored servant woman, named Eliza; the unexpired time of service of a colored servant, named Jesse; 4 mares and one horse colt folded last spring; one chaise, one dearborn wagon or barouche, one two-horse market wagon, with elliptical springs; one ox wagon, one ox cart, seven ploughs of different sizes, one harrow of 12 iron teeth, one patent revolving rake, sundry hoes, spades, shovels, and pick-axes, two sets of double horse harness, two single horse harness, eight yoke of oxen, 8 cows, 2 bulls, a flock of sheep, about 20 in number, sundry yearling and sundry two-year old calves, with other young cattle, a herd of swine on the farm, bought of G. Lee, saws, 4 ox chains, a library of medical, theological, scientific, and other books, which cost more than $6000; one gold watch, chain, and seal, worth $250; 4 silver tumblers, which cost $50; one silver cake basket, which cost $50; one silver coffee pot, 2 silver tea pots, one silver sugar bowl, one silver slop bowl, one silver cream pot, one silver sugar tongs, one silver soup ladle, two silver sauce ladles, one silver castor, 2 silver butter knives, and a variety of silver spoons and forks, all of which exceed in value $1000; three bureaus, three mahogany bedsteads, one large looking-glass, two dressing-glasses, 10 cane-bottomed chairs, two carpets, three iron stoves, one pine wardrobe, two mahogany tables, two kitchen tables, and a variety of kitchen utensils; together with a variety of crockery and other household goods, and one fire-proof iron chest, worth $400.

Each and all of the aforesaid houses, lands, articles and pieces of property and debts, I, the subscriber, as aforesaid, give and grant and assign to the before-named trustees in the manner aforesaid, that they may forever hold and possess or dispose of said herein granted property, agreeable to the provisions of this trust, which are these, viz.: said trustees shall allow the subscriber, as their agent and attorney, to take charge of each and every article of said property, and with their consent and advice, or the consent and co-operation of either of them, to sell each and every portion of the aforesaid personal property, and appropriate the same towards the discharge of any of the debts of the said Ely already incurred, and for no other purpose whatever. Said trustees shall allow said Ely, nevertheless, to use the aforesaid personal property for the support of himself and family, and the increase of his means of discharging his debts, until the same shall be sold. It is moreover agreed and provided that at any time

prior to the first day of January, A.D. 1842, said trustees, with the consent of Ezra Stiles Ely and wife, may sell and convey each and any portion of the above-described real estate, and appropriate the avails of the same towards the discharge of the just debts of the said Ely, in such manner as they shall think best; but should the said Ely not have paid each and all of his debts prior to the said first day of January, A.D. 1842, then and in that case, with or without the consent of the said Ely, his trustees or either of them shall sell each and every unsold portion of the real and personal estate hereby conveyed to them in trust at public auction, to the highest and best bidder, and shall pay over the net proceeds of said sale to his creditors, to discharge every debt in full; or if the proceeds of sale shall not be sufficient for this, then to pay each and every person to whom the said Ely is now indebted, rateable, according to the sum of money due to each creditor, and the proceeds of sale to be divided among all the creditors. It is moreover provided that if the said Ely shall, on or before the said first day of January, A.D. 1842, pay, or have paid, each and every creditor to whom he is indebted by any obligation, note of hand, indorsement, or other contract, formed prior to the ensealing of this instrument, the full amount due to said creditor or creditors, then this deed of trust shall thenceforward become and forever remain null and void, as though it had never been signed and sealed; otherwise it shall be and remain in full force according to the terms and conditions hereinbefore provided, made, and expressed. Finally, any creditor who may attempt to collect any debt from the subscriber by process of law against him, is hereby expressly excluded from all interest in and benefit from this deed of trust.

In witness whereof I have hereunto set my hand and seal, on the 22d day of November, A.D. 1837.

E. S. ELY. [SEAL.]

State of Missouri, County of Rolls, *ss.*

Acknowledged by the Rev. Ezra Stiles Ely, D.D., on 22d November, 1837, and recorded on the 1st January, 1838, in book E., pages 376, 377, 378, 379, 380, 381, and 382.

*Appendix.—Answer of Margaret Carswell.*

SHARSWOOD
*v.*
MCCLELLAN. } No. 2, Dec. T. 1848.

The answer of Margaret Carswell, defendant, to the bill of complaint of George Sharswood and Frederick A. Raybold.

This defendant, saving and reserving to herself, now and at all times hereafter, all and all manner of benefit and advantage of ex-

ception which can or may be had or taken to the said complainants' bill of complaint, for answer thereto or to so much thereof as this defendant is advised is in any wise material or necessary for her to make answer unto, answers and says, that she this respondent is the widow of Samuel Carswell, of the city ef Philadelphia, in said bill mentioned, who died on or about the 17th day of February, A. D. 1822. That she is now in the 80th year of her age, and is suffering under the infirmities necessarily incident to this advanced period of life—infirmities which assail the faculties of the mind as well as of the body. That she has been in ill health since the winter of 1836, and has been confined to her room during the greater part of the last ten years, a period of time which includes all the transactions spoken of in the complainants' bill. That she has therefore during all this time been removed from, and entirely incapable of, active participation in, or intelligent comprehension of, difficult and complicated matters of business. All which this respondent says was well known to the said complainants. And the said respondent further says, that her age and infirmities necessarily diminish the power which belongs to an earlier period of life, fully to appreciate and properly to answer a complaint, embracing so great a variety and extent of transactions as in said bill set forth. Nevertheless this respondent will proceed to answer said bill as well as she can do, and to the best of her knowledge, recollection and belief.

This respondent further answering says, that in the year 1836 she removed to the State of Missouri with the Rev. E. S. Ely, that she returned to Philadelphia in the autumn of that year, went to Missouri again in 1837, and returned in April, 1839—since which time she has continued to reside in Philadelphia.

This respondent further answering says, that Mary Ann Ely Carswell, now Miles, in the said bill mentioned, is her granddaughter, being the only child of Samuel Kinsey Carswell, in the said bill mentioned, who was a son of the respondent and her late husband the said Samuel Carswell. That this respondent was strongly attached to the said Mary Ann Ely Carswell, who, from the second year of her age, and until her marriage, lived with and was brought up by this respondent.

And this respondent further answering says, that the said Rev. E. S. Ely intermarried in the lifetime of the said Kinsey Carswell, with Mary Ann Carswell (now deceased), a daughter of this respondent, and sister of said Kinsey Carswell—and that the said Kinsey Carswell, having great confidence in the said E. S. Ely, did by his last will and testament, dated and duly proved and recorded in the register's office of the county of Philadelphia, a copy of which is hereto annexed, appoint the said E. S. Ely to be the guardian of the estate of his said only child, the said Mary Ann E. Miles, and of her person if her mother should die in her minority; that the said E. S. Ely, under said testamentary appointment, as-

sumed and took upon himself the office of guardian, and so continued to act until the marriage of the said Mary Ann Ely Miles at the time in said bill stated; and as the person so selected by the father of the said Mary Ann as worthy of trust, and as a minister of the gospel, was confided in, as of right he ought to have been, by this respondent and others, as a just, intelligent and faithful guardian of his ward.

This respondent further answering says, that she admits that the said Samuel Carswell died seized and possessed of certain real and personal estate, and leaving a will, whereby, among other bequests and devises, he did bequeath and devise as in said bill is set forth, and for greater certainty refers to said will, or a duly certified copy, when the same shall be produced by the said complainant.

This respondent believes the matters inquired of in the 2d and 3d interrogatories to be as set forth in the stating part of said bill, except as to the renunciation of the executorship and the date, and date of filing thereof, by the said Wm. Davidson and John Steel, as to which she is ignorant and uninformed, save by the allegations of said bill, and therefore prays the complainants may make such proof thereof, by production of the record or otherwise, as their case may require. And she admits that the said Samuel Kinsey Carswell, son of the respondent, died on or about the tenth day of July, 1829, as suggested in the said third interrogatory, and left the said Mary Ann Ely Carswell (now Miles), his only child, him surviving.

And this respondent further answering says, that the said Ezra Stiles Ely, as she this respondent is informed and believes, executed a deed of trust, for the benefit of his creditors, upon the 22d day of November, 1837, prior in date to the said mortgage of the 5th of January, 1838, in which deed of trust he made this respondent and the said Samuel McClellan the grantees; but this respondent, although she had reason to believe that the said E. S. Ely did contemplate about that period of time the creation of some trust in relation to his property, and to make use of her name, did not know in what manner or by what instruments that intention was carried out, and did not see the said deed of 22d November, 1837, or in any way whatever that she is aware of, accept or take upon herself the office of trustee under said deed; nor has she ever seen said original deed, or taken upon herself the execution of said trusts, to the best of her knowledge and belief. And she is informed and believes that this deed of trust conveyed to Samuel McClellan and the respondent, in trust, both real and personal estate, including the whole real and personal estate covered by the said alleged mortgage of January 5th, 1838, except some items of personal estate which are to be found in the alleged mortgage of January 5, 1838, and not in the said deed of trust, viz.: a debt of three thousand dollars due from Wm. Muldrow; five hundred dollars due from Samuel Danahower; five hundred dollars due from Joseph M. Hamton; one thousand dollars due

from the late firm of Ely, Walton & Hendricks; one thousand dollars due from Crijemen, Crumley & Miley, arrearages of rents, and some small items of furniture and stock perishable in their character.

By the provisions of said deed of trust, the said E. S. Ely reserved to himself for the space of five years from its date, the charge and control of the property conveyed by it, and the power, as self-constituted agent or attorney of the trustees, to sell the same or any part thereof, and apply the proceeds to the benefit of his creditors in the manner directed by the trust. And the respondent craves leave to refer to a copy of the said deed, which she presumes to be correct, attached to the answer of the said Samuel McClellan, or to any other copy thereof when produced, for greater certainty. It was recorded on the 5th of December, 1837, in Marion county, Missouri. Another deed of the same tenor conveying that portion of the property contained in the other, which was situated in Ralls county, Missouri, was executed by the said E. S. Ely on the 22d of November, 1837, and recorded in Ralls county on the 18th of the same month, to which also the respondent refers for greater certainty.

The said E. S. Ely, as the respondent is informed and believes, proceed under the powers reserved to him in this instrument to take measures to settle the estate. He sold, as the respondent is informed and believes, much real estate, and some personal estate, made efforts by suit and otherwise to collect debts which he supposed to be due to him, and out of the proceeds of these sales and collections paid sums to his creditors amounting in the aggregate to many thousand dollars, including nearly $8000 paid to the said Mary Ann Ely Miles, and more than $3500 paid to the said heirs of Clement Lee Bready, and about $4900 to one William Muldrow.

This respondent has also heard, and believes, that the following judgments were obtained, and are on record against the said E. S. Ely, in Marion county, Missouri:

| Plaintiffs. | Date of Judgment. | Debt. | Damages. |
|---|---|---|---|
| Clifton Rogers, . | Jan. 19, 1838, | $2,500 00, | $295 00 |
| Rich. P. Pulliam, . | " 18, 1839, | 161 00, | 16 10 |
| Wm. Nassau, . . | May 13, 1839, | 464 00, | |
| Jas. Gallaher, . . | " 5, 1841, | 2,866 97, | 365 58 |
| Marg. Carswell, . | " 3, 1842, | 3,220 00, | 901 60 |
| Ectley Stevens, . | June 1, 1842, | | 1,516 66 |
| David Dick, . . | " 6, 1842, | | 1,087 50 |
| Wm. Nassau, Sr., . | Sept. 8, 1842, | | 903 57 |
| F. P. McElroy, . | Jan. 12, 1842, | 186 00. | |

It is probable there are others, but the respondent has heard of the above only. She craves leave to produce others when found. She is advised and believes, and therefore avers, that these judg-

ments were liens upon the lands covered by the said alleged mortgage of January 5th, 1838, upon the 23d of August, 1843, and 17th of November, 1843, unless they were prevented from becoming liens by the operation of the said deed of 22d November, 1837.

And this respondent further answering says, in relation to the said alleged mortgage of January 5th, 1838, and in answer to the fourth interrogatory addressed to her, touching the same—

That she has never seen that mortgage—that she did not see it when it was executed—that she was not consulted about it, and has not seen it since—that she has no further knowledge or information about it than is derived from the allegations of the said bill of complaint, and from inquiries made since the date of the note of Mr. George W. Biddle to her, set out in said bill. As stated in a previous part of this answer, she had reason to believe, about the time of the execution of the said deed of 22d November, 1837, and of the said alleged mortgage, that the said E. S. Ely did contemplate creating some trusts of his property, and using her name, and she thinks she remembers further that she understood the protection of his wards was one of his objects, and that she would not have been unwilling that her name should in any proper manner have been used for that purpose. But of the actual execution of these instruments, or of their contents, she repeats she had no knowledge, and was in no wise a party to them; and having only very lately seen what she was told was a copy of said mortgage, she cannot say whether the contents of the original are truly set forth in said bill of complaint, and prays therefore that said complainant, if he deems it necessary to his case, may produce the said instrument, or such other proof of its contents as may be sufficient. This respondent never accepted the trusts declared in that mortgage, or took upon herself the burden of their execution, or intended so to do. Nor to the best of her knowledge, recollection, and belief, did she at any time do any act which could create a belief, or warrant a suggestion, that she had in any way any connection with that trust until the month of October, 1843, when an occurrence about to be detailed took place—and your respondent protests that she cannot be held to have undertaken the trust, or to have become responsible for its due execution, under the circumstances already stated, or under these circumstances in connection with the occurrence which she now proceeds to narrate:

In the month of October, 1843, your respondent being then confined to her chamber by ill health, received a visit from the said Samuel McClellan, who informed her, as well as she now recollects, that creditors of Dr. Ely, in Missouri, were pressing and endeavoring to sacrifice or get possession of his property, to the detriment of

his ward; that it was necessary, and advised by counsel, to prevent this sacrifice, by selling the property, and asked her to sign a letter to the lawyer authorizing him to do so. To this request she assented, and did sign a letter—the effect of which she understood was to be to save the property from sacrifice by the creditor then pressing it to sale. She does not recollect, and does not believe that she knew distinctly how or in what particular manner this effect was to be produced, except that she supposed the lawyer was to sell the property. And she does not recollect, but she presumes she must also have believed that in some way she possessed some control over it; but how, or by what instrument, she did not as far as she now recollects, then know; but she does recollect that when, at some subsequent period, she heard that the sheriff had made sale of the property in consequence of that letter, and asked the said E. S. Ely how it had been done, according to her present belief he replied that the sale had been made under a judgment which he had confessed in her favor in Missouri for fifteen thousand dollars; but whether her present belief as to this answer is correct she cannot say, and she cannot but doubt the accuracy of her memory when she reflects upon her age and infirmities, in this and perhaps in other particulars. Of this letter no copy was given to her or left with her. But since the commencement of this suit, she has, through her counsel, obtained from the said E. S. Ely a paper, which he says is a copy of that letter sent to him by Mr. Tuttle, to whom the original was addressed; and of this paper she now here inserts the following copy, but without being able to affirm to its truth, though she believes it to be true. The paper received by her from E. S. Ely is in these words:

PHILADELPHIA, October 9th, 1843.

DAVID C. TUTTLE, ESQ.

Sir: Being desirous to bring the business in which we are concerned as mortgagees of the Rev. Ezra Stiles Ely, to as speedy a close as possible, we request of you, so soon as the law will allow, to take out execution on all the property mortgaged to us, on which as our attorney in fact, he has confessed judgment, and proceed to sell all, or so much of it as may be necessary to make the amount of the judgment confessed. The terms of sale we wish to be cash down at the time of sale, and delivery of deeds of land purchased, unless we shall at the time otherwise direct through our attorney in fact.

Yours respectfully,

SAMUEL McCLELLAN,
MARGARET CARSWELL.

This respondent has just stated the state of her recollection as to the belief she entertained, or thinks she may have entertained, at the time she signed that letter. But she is well assured, and so

avers and fully believes that letter to be the only act done by her, or with her assent, or direction, in relation to any instrument in which her name may have been used as a grantee or trustee.

That the letter itself *contains nothing which indicated the existence of a trust*, or could have brought a trust, if it did exist, to the recollection of an aged and infirm female. That at the date of that letter she had never seen the mortgage of the 5th of January, and did not know its contents, and that the first time she ever became acquainted with its contents was since the date of the note of Geo. W. Biddle, Esq., to her of June last, after which her counsel communicated the substance of the mortgage to her—a copy of which, as she was informed and believed, her counsel obtained for perusal from Mr. Biddle. But, whatever may be suggested to have been the state of her knowledge at the date of that letter, this respondent submits, that the letter itself was in its language an order to counsel to proceed under the mortgage, according to the mortgage, and for the benefit of the parties entitled to the fruits of that mortgage.

The signing of the above letter is the whole of respondent's connection (if it can be so considered at all) with the alleged mortgage of January 5, 1838. She has been lately informed, and now believes, and therefore alleges that the step of selling the property under the alleged mortgage was taken in consequence of the advice of counsel who were consulted, and that it was the best thing that could be done for the interests of Dr. Ely's wards, the said Mary Ann Ely Carswell, and the said heirs of Clement Lee Bready. She is lately informed, believes and asserts, that one or more creditors of the said E. S. Ely had attached the said alleged mortgage of January 5, 1838, particularly one William Muldrow—who had purchased at sheriff's sale, or had levied an execution upon a very large amount of property, as the property of the said E. S. Ely, and the respondent is lately informed and believes this to have been principally the property covered by the said alleged mortgage of January 5, 1838. Muldrow had seized, under an execution, much personal as well as real property, as the property of Dr. Ely, as respondent is lately informed and believes, and generally prevailed in making the jurors, who, under some process in Missouri, sat to inquire into the question of property, believe that Dr. Ely's wards had no claim to his property better than the claims of his other creditors. It was under these circumstances, when the property covered by the alleged mortgage was being swept away by the verdicts of juries, that the advice of counsel was taken and given as above stated, as this respondent has lately been informed, and believes.

Respondent asserts and believes that to sell under the mortgage was the best thing that could have been done to protect the interests of Dr. Ely's wards.

And this respondent doth not know, and cannot as to her belief or otherwise, save as she is informed thereof by said bill, answer the

5th interrogatory, whether said indebtedness of $30,000, in said bill mentioned, and in said alleged copy of said mortgage mentioned, arose under, or by reason of, or by consequence of the said trusts in said bill alleged to exist under the said will of the said Samuel Carswell.

And this respondent doth not know, and cannot as to her belief or otherwise, save as she is informed thereof by said bill, answer the inquiry in the 6th interrogatory, whether the said indebtedness of $30,000 continued on the part of said E. S. Ely to said Mary Ann E. Carswell, during the five years following the alleged execution of the said alleged mortgage—nor whether the same was considerably increased during said period—nor whether the same is still due and unpaid, except that she can and does answer that she has been informed since the commencement of this suit, and believes, and therefore asserts that the said E. S. Ely, acting under the said deeds of trust of November 22, 1837, paid to the said Mary Ann Ely Miles, within the said period of five years, the sum of over seven thousand six hundred dollars. But she is ignorant whether this payment was on account of said indebtedness of $30,000 or not, and prays that the complainants may be held to show that it was not on account of said indebtedness of $30,000.

Respondent now believes it to be true that the lands mentioned in the alleged copy of the alleged mortgage of January 5, 1838, were sold by the sheriff of Marion County, Missouri, under an execution issued in consequence of the above letter, and that by far the largest portion thereof was conveyed to her and Dr. McClellan by deed-poll of the said sheriff, dated November 17, A. D. 1843, and she annexes to her answer a copy of a certified copy of said deed, procured by her agent since the beginning of this suit.

But the respondent never gave or united with any one in giving directions to buy in the said lands for the benefit of the trust, or for the benefit of herself or any other person or persons, nor did she ever buy in said lands by herself or any other person, either for the benefit of the trust or otherwise. And she never had in her possession money or means, even to the smallest amount, belonging to said alleged trust, wherewith to buy them in, nor is she aware that the said Samuel McClellan ever had any such money or means—and she never authorized or directed the sheriff's deed to be made to her and the said Samuel McClellan, and never knew that it was so made, until very recently, since the commencement of this suit, and she has been lately informed, and now believes, that the lands were in fact sold to the said Samuel McClellan alone, having been purchased at the sale by David C. Tuttle for him; and she never had any interest in them after the sale, either as trustee or otherwise, that she is aware of, unless possibly it may be as a creditor of Dr. Ely, entitled to the benefits of the deed of trust of November 22, 1837—(and she avers she is, and was such a creditor)—or possibly as trustee under that deed.

Respondent states that after the end of the letter signed by herself and the said Samuel McClellan, which is above set out, there are to be found in the copy thereof, handed to her counsel by Dr. Ely, inclosed in a letter to Dr. Ely, from David C. Tuttle, the following words:

P. S. In order to prevent any unnecessary sacrifice, I wish you to purchase in my name, in trust for the creditors, according to the mortgage, all the property which may otherwise be sacrificed at the sale.

SAMUEL McCLELLAN.

But respondent never signed, nor, as far as she recollects, was asked to sign the said postscript, and is not aware, and therefore denies that she ever saw said postscript, or that it was annexed to the letter when that letter was signed by her. The postscript, and the direction therein contained, was the act of said Samuel McClellan alone.

This respondent further answering says, that it is not true, as charged in said bill, and inquired of in the seventh interrogatory, that any portion of the lands mentioned in the said alleged copy of the said alleged mortgage of January 5, 1838, were allowed to be sold by her, or by her consent, or her privity or connivance, at nominal prices, or in derogation of the trust.

Respondent signed the letter above set forth, and now believes the lands were sold under an execution on the alleged mortgage of January 5, 1838; but she had no means of influencing or controlling, in any degree, the prices at which the lands should be sold, and did not in any way attempt to control or influence them, to the detriment of Dr. Ely's wards.

Respondent would be glad if she had it in her power to state that the lands sold so high as to produce enough to pay the claim of the complainants in full, if that claim is a just one. But she was altogether helpless in the affair, and unable to accomplish such an event. She has been lately informed and believes, and therefore asserts, that all the lands bought in by direction of the said Samuel McClellan were bought for the sum of ten dollars and seventy-five cents, and that the residue were bought for the sum of sixteen dollars and ten cents.

Respondent says that she has been lately informed and believes these prices were not lower than was natural; that the lands in themselves were of small value; that Dr. Ely had, as above stated, conveyed away all these lands, and nearly all the personal property mentioned in said alleged copy of said alleged mortgage of January 5, 1838, by said deed of November 22, 1837, duly recorded December 5, 1837, in Marion county, Missouri; and a purchaser would therefore perceive that the title under the mortgage was defective and invalid. It appears also by the sheriff's deed, a copy of which

is hereto annexed, that a purchaser would take subject to the liens of the judgments above stated. Moreover, as above stated, the alleged mortgage of January 5, 1838, had itself been attacked by creditors of Dr. Ely as being void.

The respondent further answering to this part of said bill says, that she has been lately informed and believes, that the said William Muldrow had seized in execution, as the property of E. S. Ely, a number of slaves, some belonging to the said E. S. Ely, and some to Mr. J. H. Patterson, and other property, both real and personal; and after he had obtained a large portion of the personal estate by the verdicts of juries, as above stated, and had sold much real estate, it was thought best, in order to save anything for the wards of the said E. S. Ely, to make a compromise with those who were endeavoring to set aside the said alleged mortgage of said E. S. Ely.

That compromise was, as respondent has been lately informed and believes, that Mr. Patterson consented to let his slaves go to Muldrow for the debt of the said E. S. Ely on condition of receiving an equivalent in land; and the creditors in Missouri of the said E. S. Ely agreed not to bid against the interests of his wards if he would allow them to buy certain property at sheriff's sale towards the liquidation of his debts to them.

It was, as respondent is informed and believes, in accordance with this compromise that a small proportion of the said lands were purchased by the said J. H. Patterson, and by other creditors of the said E. S. Ely, at the sheriff's sale under the alleged mortgage, and much the largest part thereof was bought in the name of the said Samuel McClellan, as appears by a copy of the sheriff's sale bill, and was afterwards conveyed by the said sheriff to the respondent and the said Samuel McClellan, as before stated.

Respondent therefore denies that a great loss, or any loss, was sustained by said Mary Ann Ely Miles through the purchase by others of part of the lands in said alleged mortgage mentioned, and says that said sale was part of a compromise, which said compromise was highly to the advantage of the wards of the said E. S. Ely.

If it had not been made, the creditors of Dr. Ely, as respondent has been lately informed and believes, would have bid at the sheriff's sale for all the mortgaged property more money than the respondent, Dr. McClellan, and Dr. Ely, could have paid, and yet not enough to have paid the wards of Dr. Ely any considerable amount, if anything at all, after satisfying their prior claims. But this compromise, much to be desired, and highly advantageous as it was, was not made by this respondent, or by or with her advice, consent, privity, connivance, or knowledge. She has never, that she is aware of, ratified or confirmed it, or in any way assented to it. She was living in Philadelphia when it was made, and had no knowledge or information concerning it till after the beginning of this suit. All her information about it is the result of inquiries made since the suit was

begun. She has already stated her whole connection with the affair, which consisted in signing the letter above stated, containing instructions to sell all, or so much of the mortgaged property as was necessary to satisfy the claims of Dr. Ely's wards. She had no money or means belonging to the trust under the said alleged mortgage wherewith to enter upon the arduous and difficult task of making such a compromise, or to employ an agent to make it, or to buy in any part of the lands. She believes the said compromise was made by Dr. Ely, either in his own name, or in the names of this respondent and Samuel McClellan. If the latter was the case, then it was done without a shadow of authority from this respondent, or, as this respondent believes, from Dr. McClellan.

The respondent further answering says, that she is lately informed and believes, that the taxes on the lands so purchased in at the said sheriff's sale have been regularly paid by some person, probably by the said E. S. Ely, up to the present time.

The respondent further answering says, that she does not claim the lands so bought in in the name of the said Samuel McClellan for her own sole benefit. And she is willing to convey to the several wards of the said E. S. Ely, or to such person or persons as trustees for them as this court may consider are in equity entitled to receive such conveyance, all the right, title, and interest which the said deed of the said sheriff of Marion county may have passed to her, this respondent, in the said lands, so as aforesaid included in and conveyed by said deed, provided ample and undoubted indemnity can be secured to her, either by the decree of this honorable court or otherwise, for so doing, and provided full and sufficient release and discharge be given to her from the said trust, and from all imputed responsibility as trustee for past or future events affecting or connected with the same.

And the respondent further answering says, in answer to the eighth interrogatory in said bill, that it is not true, as stated in said bill, that this respondent allowed the personal property included in said alleged mortgage, or any part of it, to be taken by any one not entitled thereto under said alleged mortgage.

Respondent has already stated her only supposed connection with the business. She has been lately informed and believes, that the whole personal property in said alleged mortgage mentioned, except the debts and part of the library hereinafter mentioned, was seized in execution, and sold or taken out of Dr. Ely's possession or control before the expiration of the five years at the end of which the mortgage became due, and that, at the expiration of that period, there was none of it that could be reached by process of law under the said alleged mortgage.

Respondent has already stated her whole knowledge and belief concerning the existence of a trust, and here adds that if she has at any time had thoughts about a trust, she has at all such times sup-

posed the trust to include only landed property. She did not know, and was not informed till after this suit was commenced, that the said alleged mortgage contained any personal property. With regard to the library in said alleged mortgage mentioned, respondent has been lately informed and believes, that a part thereof had been pledged by the said E. S. Ely to said Samuel McClellan, previously to the date of the said alleged mortgage, as security for some liability he was under for the said E. S. Ely as his indorser, and remained in his possession till within a short time, when he sent it to Dr. Ely to use, with an undertaking to return it to said Samuel McClellan when it should be called for. The liability as indorser, she has been lately informed and believes, has never been removed.

She has been lately informed and believes, that the remaining portion of the library, which was the most valuable, was taken by Dr. Ely to Missouri, and was there taken in execution and sold by his creditors, as respondent is informed and believes, before the expiration of five years from January 5, 1838.

Respondent does not know the value of the said library, and does not know further than has just been stated what portion thereof was in possession of the said Samuel McClellan, or what portion was taken by the said E. S. Ely to Missouri.

It is not true, as stated in said bill, that this respondent "allowed" the said part or any part of the said library to be taken by the said E. S. Ely, and retained for his own use—or that it was left in the possession of said Ely by her consent or connivance. She knew nothing of it whatever; had no control over it, nor any means of asserting a claim to it. She is ignorant of any portion of the said library having been in the possession, or under the control of the said James H. Patterson, further than she is informed thereof by the said bill, and except that she has been lately informed, and believes that a few books, about 30 volumes, the property of the said E. S. Ely, were taken in execution in Missouri by a creditor, and sold at sheriff's sale in 1844, to the said James H. Patterson, but she is ignorant, and has not been informed whether they were part of the said library or not.

The respondent further answering says, in answer to the ninth interrogatory in said bill, that she never accepted the trust in the said alleged mortgage contained, further than she may be supposed to have done so in ignorance, by signing the letter above stated, under the circumstances stated, and she has not, that she recollects, made any efforts to collect the said debts; the debt due by William Muldrow, respondent has been lately informed and believes, was extinguished before the expiration of five years from the 5th of January, 1838; it was taken into an account, passed upon by referees, as respondent has been lately informed and believes, which referees were duly appointed, and who found and awarded a large balance due by the said E. S. Ely to said William Muldrow; Samuel

Donahower, respondent has been lately informed and believes, was insolvent long before the expiration of five years from the 5th of January, 1838, and respondent therefore could not have recovered the debt due from him if she had made the attempt. She has been lately informed and believes, that the said E. S. Ely has endeavored to collect the debt, but had failed; the debt due from Joseph Hampton, she has been informed and believes, could not have been recovered for similar reasons; the debts due from Samuel Carswell Ely and Robert J. Smith, and from Paul Hunter, respondent has been lately informed and believes, and secured by mortgages now in the possession of the said E. S. Ely, who is willing to give them up to the proper person; respondent does not know how to compel their delivery, and has no means of doing so; the firm of Ely, Walton & Kendricks became insolvent within a year after the execution of the said alleged mortgage of January 5th, 1838, as respondent has been lately informed and believes; Crijemire, Crumley & Miley, and William R. Downing, became insolvent before the expiration of five years from January 5th, 1838, as respondent has been lately informed and believes; and William R. Downing is deceased, as she has been lately informed and believes; as to the debt due from Marion College, a suit therefore was brought by the said E. S. Ely, as respondent has been lately informed and believes, in the name of this respondent and the said Samuel McClellan, in which judgment was rendered for the defendants; respondent does not know what part of said alleged debts are really due, nor what part of them were not barred by the statute of limitations before the said alleged mortgage fell due, and prays that the complainants may make such proof thereof as they can, and as they may think proper. She never realized any money for the said debts, and she never had any means belonging to the said trust wherewith to pay costs and expenses of collecting them—nor does she know that the said Samuel McClellan ever had any; the said debts, if lost (as to which she is ignorant further than as above stated), have not been lost by her neglect. She has been guilty of no neglect, and was not bound to attempt their collection. If she had known and assumed the trust, she could not have attempted their collection till the expiration of five years from January 5th, 1838, nor then, until proper legal steps were taken to foreclose the equity of redemption of the said alleged mortgage.

This respondent further answering says, she is ignorant of the matters inquired of in the complainants' tenth interrogatory, further than this: that part of the silver plate, she has been lately informed and believes, was sold by the said E. S. Ely, acting as before mentioned under the said deed of trust of November 22d, 1837, and the proceeds applied to the payment of his debts within said five years; and she has been lately informed and believes, that none of the remainder was in his possession or within the reach or control of

any person, claiming under said alleged mortgage, as trustee, at the end of five years from January 5th, 1838.

The respondent has already answered the eleventh interrogatory as fully as is in her power.

And this respondent further answering says, in answer to the twelfth interrogatory in said bill, that she believes that a deed of trust, dated October 2d, 1843 (more than a month previous to the said sheriff's deed of November 17th, 1843), was executed between the said Thomas J. Miles and the said Mary Ann Ely, his wife, of the one part, and the said Frederick A. Raybold and George Sharswood of the other part, of the contents of which she has no knowledge, except from a copy lent to her counsel by the counsel for the complainants, to which deed when produced by the said complainants, the respondent refers for greater certainty, and which said deed according to said copy purported to convey all the estate, real, personal, and mixed, of the said Mary Ann Ely Miles to the said parties of the second part, in trust for certain purposes, and among other things in trust "to sell or otherwise dispose of at public or private sale, as they may deem expedient, all or any part of the said real or personal estate, and a deed or deeds therefor in due form of law to execute and deliver, and the proceeds arising from such sale or sales to invest from time to time, in such manner as they may deem most safe and advantageous, and the same from time to time to sell and reinvest. And in trust further to receive the rents, profits, issues, income, dividends, and interest thereof; and after deducting thereout all reasonable charges and expenses, to pay the nett amount thereof from time to time to the said Mary Ann Ely Miles, during all the term of her natural life, for her sole and separate use and upon her sole and separate receipt, notwithstanding her coverture, free from all debts, engagements, and control of her said or any future husband." And that the said Thomas J. Miles and the said Mary Ely Carswell were united in marriage about the date mentioned in said bill of complaint, but the said deed of trust was executed after the said marriage, as appears by the said copy, and it was not separately acknowledged by the said Mary Ann Ely Miles. The said sale of the said lands by the said sheriff took place, as respondent is lately informed and believes, on the 17th of November, 1843.

This respondent further answering, says, as to the matters inquired of in the thirteenth interrogatory, that she has no other knowledge or belief concerning them, than that resulting from the allegations of the said bill, and prays the complainants may make such proof thereof as to them may seem fit.

And the respondent further answering says, in answer to the fourteenth interrogatory of said bill, that the copies of the correspondence between the counsel of the complainants, the respondent, and her counsel, annexed to said bill, are true and correct. But the

respondent does not admit her reply to be evasive: it was a direct application for information upon a matter in relation to which, as she has already said, she was ignorant. She is not aware of any other inquiry made of her than is contained in the said correspondence.

This respondent further answering says, in answer to the fifteenth interrogatory, that she denies that the property mentioned in the said alleged copy of the said alleged mortgage of January 5th, 1838, has been in any way wasted or mismanaged by her, or made unproductive. If it has been unproductive, respondent believes it is owing to its actual value being small, to its distant locality, to the sparseness of population, and to the embarrassments of the said E. S. Ely, and the prior liens upon it held to a very large amount by creditors residing on the spot, as well as to the uncertainty and imperfection of any title to be taken under the said mortgage.

Respondent submits that she has done all that duty could have required her to do if she had been aware of the imputed trust, to make the property productive. She does not know that any part of the said E. S. Ely's alleged indebtedness to the said Mary Ann Ely Miles has been paid or discharged out of the property, or whether any advantage has accrued to her from it, except that she has lately heard and believes that an advantageous compromise was made as hereinbefore stated about the time of the sheriff's sale thereunder.

And this respondent further answering says, that she never received any benefit or advantage whatever from the said alleged trust, either as to the personal or real estate, and has never received any part of the property in the said alleged mortgage mentioned, either real, personal, or mixed, and has never received any money whatever, even to the smallest possible amount, from the sale of any of the said real or personal or mixed property. And has no money, and never had any (even to the smallest amount), in her possession, or control in any way, belonging to, or arising from said alleged trust. She has never heard, and does not believe that the said Samuel McClellan ever received any benefit or advantage from the said alleged trust, either as to the personal or real estate, or that he has ever received any part of the real, personal, or mixed property in the said alleged mortgage mentioned (except a part of the library above stated), or that he has ever received any money, even to the smallest possible amount, from the sale of any of the said property, real, personal, or mixed; or that he has, or ever had any money in his possession or control, even to the smallest amount, belonging to or arising from the said alleged trust—but if, contrary to such belief, he has received any benefit from, or any money, or property of any description, from said alleged trust, this respondent avers that he has so received without the knowledge, approbation, or consent in any way of this respondent.

And this respondent further avers that she never had possession

or control of, and never saw any of the muniments of title of the said E. S. Ely to the said lands, or any of them, nor does she know what title the said E. S. Ely may have had thereto, nor does she know or believe that the said Samuel McClellan was or is in this respect in a different situation from this respondent.

And the respondent humbly submits, and objects that the said E. S. Ely is a proper and necessary party to the said bill, and that the said bill is fatally defective for want of his being a party thereto. She prays the full benefit of this objection, as if taken by demurrer or by plea stating the matters in the answer set forth, or in any other more effectual way.

And she further humbly submits, and objects that the children of Clement Lee Brady, mentioned in said alleged mortgage, and in said bill (but whose names are unknown to her), are proper and necessary parties to the said bill, and that the said bill is therefore fatally defective. She prays as full benefit of this objection as if taken by demurrer, or by plea, stating the matters herein contained, or in any other more effectual way.

She further humbly submits that the said Mary Ann Ely Miles, and the said Thomas J. Miles are proper and necessary parties to the said bill, and that the said bill is therefore fatally defective. She prays as full benefit of this objection as if taken by demurrer, or by plea, stating the matters herein contained, or in any other more effectual way.

She further humbly submits that the said James H. Patterson is a necessary party to said bill, which is therefore fatally defective. She prays as full benefit of this objection, as if taken by demurrer, or by plea, stating the matters herein contained, or in any other more effectual way.

She further humbly submits that this honorable court will not take jurisdiction of the matter of the said bill, further than honorably to discharge her from the said trust, but will leave it to the courts of Missouri, where most of the acts, doings, and events relating to this case occurred, where the witnesses reside, and their characters are known, where the said alleged debtors reside, where the alleged trust was created as well as the trusts under the said deeds of Nov. 22, 1837, where the property has its locality, and where alone the questions arising under the said deeds and mortgages, as to their validity, their operation, the duties of the trustees, and the rights and duties of those interested under them, and the effect of the sheriff's sales, many of which questions are, she is advised, important, and dependent upon the laws of Missouri, and other questions arising under the facts of this case, can be safely settled and adjudicated in accordance with the laws of Missouri, so far as regards the said lands, and where alone a complete and final adjustment of the rights of all parties interested, can safely be made, and a full and reliable account be taken.

And this respondent humbly prays to be hence dismissed with her reasonable costs and charges by her in this behalf most wrongfully sustained.

MARGARET CARSWELL.

JOHN M. SCOTT,
L. A. SCOTT,
Solicitors for Respondent.

*Copy of Will of Samuel K. Carswell, referred to in above Answer.*

Know all men by these presents, that I, Samuel K. Carswell, of the city of Philadelphia, do make this my last will and testament, that is to say, I give all my estate, after my debts are paid, and funeral charges, to my wife Elizabeth, and I appoint the Rev. Ezra Stiles Ely, D.D., of Philadelphia, executor of this my last will, and I request that my wife Elizabeth may be the guardian of our infant daughter's person so long as my wife shall remain my widow, while I nominate and appoint the said Ely to be the guardian of my said daughter Mary Ann, and if my wife shall decease or marry again after my decease, then I wish the said Ely to be guardian both of the person and property of said daughter.

Done at Holmesburg, Pa., this seventeenth day of June, A. D. 1829.

SAMUEL K. CARSWELL.

Witnesses present,
JOHN ROBISON,
MARGARET CARSWELL.

Philadelphia, July 16, 1820. Then personally appeared John Robison and Margaret Carswell, the subscribing witnesses in the aforegoing will named, and on their solemn oaths, according to law, did depose and say, that they were present, and did see and hear Samuel K. Carswell, the testator in the foregoing will named, sign, publish, and declare the same as and for his last will and testament, and that at the doing thereof, he was of sound mind, memory, and understanding, to the best of their knowledge and belief.

Coram.

JOHN B. SEWELL,
Dep. Reg.

Same day, Ezra Stiles Ely, executor, sworn, and that he would diligently and faithfully comply, and well and truly regard the provisions of the law relating to collateral inheritance.

*Copy of Sheriff's Deed, referred to in the above Answer.*

State of Missouri, County of Marion, *ss.* In the Recorder's Office.

This indenture, made and entered into this 17th day of November, in the year of our Lord 1843, between Jordan J. Montgomery, sheriff of Marion county, in the State of Missouri, of the first part, and Margaret Carswell and Samuel McClellan, of the second part, witnesseth, that whereas Margaret Carswell and Samuel McClellan, plaintiffs, on the 23d day of August, A. D. 1843, at the Circuit Court for Marion county, in the State of Missouri, hath recovered against Ezra S. Ely, defendant, for debt, the sum of dollars and cents, and the sum of 34,000 dollars and cents, which to the plaintiff were adjudged for debt, and also the sum of 8 dollars and 5 cents costs, for which said debt, damages, and costs, a writ of execution was issued on the 16th day of October, 1843, from the office of the clerk of the Circuit Court of the said county of Marion, signed by John P. Rutter, clerk thereof, and to the sheriff of Marion county directed, commanding him that of the goods and chattels and real estate of the aforesaid Ezra S. Ely, he caused to be made the debt, damages, and costs aforesaid, and that he have the same before the judge of said court, on the first Monday in November, A. D. 1843, to satisfy said debt, damages, and costs, and that he certify to said judge how he executed said writ, and that he have then there this writ. And by authority of said writ of execution, the said Jordan J. Montgomery, sheriff of Marion county aforesaid, levied upon and seized, all the right, title, interest, and claim of the said Ezra S. Ely, in and to the following described real estate, to wit: lots No. 5 and 6, in block 26, in the town of Palmyra, and lots No. 4, 5, and 6, in block No. 47, in Dickinson's addition to the town of Palmyra, in the county of Marion, 48 acres of the west of section 34, township 67, range 6 west, being defendant's interest after deducting 17 acres sold to J. G. Easton and S. Brawlding, and 15 acres sold under the above-named execution to Arthur Roach. The northwest quarter of the northeast quarter of section 25, township 57, range 8 west; the southeast quarter of the southeast quarter of section 26, township 57, range 7 west; the west half of the southeast quarter of section 26, township 57, range 7 west; the east half of the northeast quarter of section 27, township 57, range 7 west; the west half of the southwest quarter of section 26, township 57, range 7 west; the west half of the northwest quarter of section 36, township 57, range 7 west; the east half of the southwest quarter of section 33, township 58, range 5 west; the east half of the northeast quarter of section 17, township 58, range 5 west; fractional section 22, township 59, range 5 west; the east half of the southwest quarter of section 33, township 57, range 6 west; the east half of the southeast quarter of section 33, township 57, range 6 west; the southwest quarter of the southeast quarter of section 33,

township 57, range 6 west; the north half of section 33, township 57, range 6 west; except 5 acres, being a strip of land 10 rods wide, extending across the south side of the west half of the northwest quarter of said section, 60 acres of land (sold by James Thomas to E. S. Ely), being part of the west half of the southeast quarter of section 21, township 57, range 6 west, and by Wm. R. Downing to Mary Ann Miles Ely, and by Wm. Dalzell to Benj. Ezra Stiles Ely, in the northeast quarter of the southeast quarter of section 21, township 57, range 6 west; the northeast quarter of the northeast quarter of section 29, township 57, range 6 west; 10 acres of land, being a lot 20 rods wide from east to west, and 80 rods deep from north to south, on the west side of the northeast quarter of the southeast quarter of section 34, township 57, range 6 west; 447 acres of land sold by Rhodes Gentry and wife to E. S. Ely, in township 57, range 6 west, except 15 acres sold to J. C. Beaty, A. J. Dallas, and Benj. Pyatt, subject to a mortgage to James Gallagher, together with the buildings and improvements thereunto belonging, and did expose the same to sale, subject to all prior liens and judgments, publicly, by auction, for ready money, at the door of the court-house within and for the said county of Marion, on the 17th day of November, A.D. 1843, between the hours of nine in the forenoon and five in the afternoon of that day, during the term of the Circuit Court of said county of Marion (having previously given twenty days' notice of the time and place of sale, and what real estate was to be sold, and where situated, by at least six handbills, signed by said Jordan J. Montgomery, sheriff of said county of Marion, and put up in public places in different parts of said county of Marion). And the aforesaid party of the second part, who was the highest bidder, at the sum of ten dollars and seventy-five cents, became the purchaser thereof. Therefore for and in consideration of the sum of ten dollars and seventy-five cents, to the aforesaid Jordan J. Montgomery, sheriff, in hand paid by the aforesaid Margaret Carswell and Samuel McClellan, the receipt whereof is hereby acknowledged, the said party of the first part has bargained and sold, and by these presents does sell and convey, unto the said Margaret Carswell and Samuel McClellan, all the right, title, interest, and claim which the aforesaid defendant, Ezra Stiles Ely, had in and to the above described real estate, subject to the aforesaid execution, so far as he the said Jordan J. Montgomery, sheriff of Marion County, can do. To have and to hold the above granted premises, to the said Carswell and McClellan, and their heirs and assigns forever, against the claim or claims of him the said Ezra S. Ely, and all others claiming under him by title acquired since the lien of the aforesaid judgment, but against the claim or claims of no other person or persons whatsoever.

In testimony whereof, I, Jordan J. Montgomery, sheriff of

[SEAL.] Marion County, have hereunto set my hand and seal, on the day and year first above written.

JORDAN J. MONTGOMERY,
Sheriff of Marion County.

*Order to amend Complainants' Bill.*

Common Pleas, in Equity. December Term, 1848.

SHARSWOOD et al.
*v.*
McCLELLAND et al. } No. 2.

And now, June 18th, 1849, on motion of George W. Biddle, solicitor of complainants, the court grant an order for the amendment of the complainants' bill in the above case, by making Thomas J. Miles and Mary Ann Ely Miles, his wife, parties complainants to said bill.

Also, by stating in said bill that Ezra Stiles Ely was discharged as an insolvent debtor under the insolvent laws of Pennsylvania, on the 27th day of November, A.D. 1847; having named, in the assignment marked D., annexed to his petition for the benefit of the said insolvent laws, James Todd, Frederick A. Raybold, and Samuel McClelland as his assignees, who have never accepted the said trust, but refused to act thereunder, and that said Ezra Stiles Ely has from that time continued to be and still is insolvent.

Also, by making Mrs. Mary Bready (in whom is now vested all the interest of the heirs of Clement Lee Brady under the mortgage deed of 5th January, 1838, and sheriff deed of 17th November, 1843, to the defendants, McClellan and Carswell, mentioned and referred to in complainants' bill) a party defendant to said bill.

*Additional Interrogatories.*

Common Pleas of Philadelphia County, in Equity. December Term, 1848.

SHARSWOOD et al.
*v.*
McCLELLAN et al. } No. 2.

Additional Interrogatories to Complainants' Bill as amended.

1. Whether Ezra Stiles Ely, heretofore named in the complainants' bill, was not discharged as an insolvent debtor under the insolvent laws of Pennsylvania, on the 27th day of November, A.D. 1847, having named in the assignment marked D., annexed to this petition for the benefit of the said insolvent laws, James Todd, Frederick A. Raybold, and Samuel McClellan, his assignees under said insolvent

laws; and whether the said James Todd, Frederick A. Raybold, and Samuel McClellan have not all and each of them hitherto refused to accept the said trust, or to act as the assignees of said Ely as aforesaid; and whether any other assignees of said Ely have been named or appointed; and whether said Ely has not, from the time of his said discharged under the insolvent laws as aforesaid, continued to be and is not now insolvent.

2. Whether Mrs. Mary Brady, who has been made a party defendant to the complainants' bill by an order of court made on the 18th June, 1849, has not vested in her and is not entitled to all the rights, benefits, advantage, and interest of the heirs of Clement Lee Brady, under the mortgage deed of 5th January, 1838, under the sheriff's deed of 17th November, 1843, to the defendants, McClellan and Carswell, mentioned and referred to in the complainants' bill.

GEO. W. BIDDLE,
Solicitor for Complainants.

August 7th, 1849.

Note.—The defendants, McClellan, Carswell, and Brady, are each required to answer the above additional interrogatories, numbered 1 to 2, inclusive.

Common Pleas, in Equity. December Term, 1848.

SHARSWOOD et al. v. McCLELLAN et al. } No. 2.

Enter a rule on the defendant, Mrs. Mary Brady, to please answer or demur to the complainants' bill and amended bill on or before the first Monday of September, 1849; and upon the defendants, McClellan and Carswell, each, to plead, answer, or demur to the complainants' bill as amended, and the additional interrogatories thereto, Nos. 1 and 2, on or before the said first Monday of September, 1849.

GEO. W. BIDDLE,
Solicitor of Complainants.
August 7, 1849.

A. W. Olwine, Esq.,
P. C. P.

*Answer of Mrs. Mary Carswell.*

In Equity. In the Common Pleas.

SHARSWOOD et al. v. McCLELLAN et al. } No. 2, to December Term, 1848.

The answer of Margaret Carswell, one of the defendants, to the

amended bill of complaint of George Sharswood and Frederic A. Raybold.

This respondent, saving and reserving to himself at all times hereafter all benefit and advantage of exception to said complainants' bill of complaint, original or amended, for answer to said amended bill, or to so much thereof as she is advised it is material or necessary to reply to, answers and says:

To the first interrogatory in said amended bill she says: That she has heard and believes that the said Ezra Stiles Ely did apply to some court for a discharge as an insolvent debtor, but does not recollect to have heard that he was actually so discharged, and has no knowledge or justifiable belief upon the subject; nor does she know that any persons, or who, were appointed his assignees by the court, but thinks that she has heard that persons were so appointed, and that they were as in said interrogatory suggested, James Todd, Frederic A. Raybold, and Samuel McClellan, which Frederic is one of the complainants in this case, and which Samuel is one of the defendants; but whether these assignees or any of them were actually appointed, or if appointed whether they or any of them have refused or declined to act, and whether other assignees have or have not been appointed by the said court, is entirely unknown to this respondent, and she has no belief upon the subject, and prays that said complainants may prove their allegations, if by them deemed necessary; and this respondent still submits that the said E. S. Ely is a necessary party to said bill.

In answer to the second and last interrogatory in said amended bill, addressed to this respondent, she answers that she is entirely ignorant, and has not heard, and has no means of forming a belief, whether Mrs. Mary Brady has or has not vested in her, and is or is not entitled to all or any of the rights, benefits, advantages, and interest of the heirs of Clement Lee Brady, under the mortgage deed of the 5th of January, 1838, and the sheriff's deed of the 17th of November, 1843, in said interrogatory mentioned, and prays that said complainants may be held to make proof thereof, if by them deemed necessary to their case; and she submits still that said heirs are necessary parties to said bill, and prays to be hence discharged with her reasonable costs.

MARGARET CARSWELL.

The above named Margaret Carswell, being duly affirmed, says that the matters stated in the foregoing answers are true to the best of her knowledge and belief; true where she speaks from her own knowledge, and believed to be true where she speaks of belief resting upon information derived from others.

MARGARET CARSWELL.

Affirmed and subscribed before me, August 21st, 1849.

JOHN THOMPSON,
Ald.

*Appearance of Dr. Ely.*

Common Pleas. In Equity.

SHARSWOOD et al. v. McCLELLAND. } December Term, 1848. No. 2.

And now, Sept. 26, 1849, Dr. Ezra Stiles Ely, in obedience to the order of court, appears as a party defendant in this case, by his attorney, and waives service of a subpœna, &c.

JAMES TODD,
Attorney for Dr. Ezra Stiles Ely.

*Mrs. Brady's Assent to Decree for Conveyance.*

Common Pleas of Philadelphia County. In Equity.

SHARSWOOD et al. v. McCLELLAN et al. } December Term, 1848. No. 2.

I hereby state that I assent to the proposed order and decree of the court, requiring the defendants in the above case, Margaret Carswell and Samuel McClellan, to make a conveyance to Thomas J. Miles, in trust, to hold the same for myself and George Sharswood and Frederick A. Raybold, trustees of Mrs. Mary Ann Ely Miles, in the proportions to which we are respectively entitled under and by virtue of the mortgage deed from Ezra Stiles Ely to the said Margaret Carswell and Samuel McClellan, dated January 5, 1838, referred to in the complainants' bill in this case.

MARY BRADY.

In Equity.

SHARSWOOD et al. v. McCLELLAN et al. } Dec. '48. No. 2.

And now, March 9, 1850, this case being again mentioned, and it appearing that the "minute of a decree" made on the 2d inst. was made in mistake, it is ordered that said minute shall be and is considered as cancelled, and that the exceptions filed by the respondent, Mrs. Carswell, to the form of decree prepared upon that minute by the counsel for the complainants, shall consequently be considered as withdrawn, and the cause be considered as in the same position in which it stood prior to the said 2d of March.

*Exceptions of Mrs. Carswell to draft of proposed Decree.*

SHARSWOOD
*v.*
McLELLAN. } In Equity.

Exceptions to the draft of decree, prepared by the counsel of complainants, and sent with note dated 5th March, 1850, to the counsel of the respondent, Margaret Carswell:

The said respondent, Margaret Carswell, protesting that the delivery of a decree, or of a minute of a decree, upon a day specially assigned to other than equity business (namely, to insolvent cases), without notice to this respondent or her counsel, is irregular, for exception to said draft of decree says—

That she excepts to said draft in the whole for the reason above stated, and for this further reason: that her counsel have not been able to obtain access to the "minutes furnished by the court," notwithstanding their request to the counsel for the complainants to be permitted to see such minutes, as stated in the copies of notes hereto annexed.

Said respondent further excepts to said draft of decree:

1. Because by said draft the court are made to decree broadly and without limitation, that this respondent is a trustee for Mary Ann Ely Miles and for Mary Bready, without designating how she becomes such trustee—whether with full knowledge, and by voluntary acceptance—or in ignorance, and without any act of her own—and therefore as a mere channel through which equity will require the title to be transmitted.

2. Because the court are by said draft made to prescribe a form of deed too broad, in this, that it does not limit the conveyance to the mere right of title and interest which the mortgage and the sheriff's deed may be supposed to have cast upon this respondent, if any title was so cast, and in stating seisin in her of the premises to be conveyed.

3. Because by the draft the court are made to appoint a trustee without exacting any security from such trustee, and without any inquiry into his fitness, so made as to give opportunity to other parties interested in the conduct of the trust, to participate in such inquiry, although the pleadings show that other interests are involved in the proper conduct of such trust and management of the properties to be conveyed.

4. Because the reservation at the end of the draft is imperfect, insufficient, and not in accordance with the intention of the court.

5. The respondent excepts for such other reasons as to her counsel may seem advisable, after they shall have been permitted to see the minutes of the court, and she respectfully asks an opportu-

nity to see and consider such minutes before she shall be held to have stated all her exceptions.

J. M. SCOTT,
Counsel for the respondent Carswell.

Copies.

Common Pleas, Equity.

SHARSWOOD
*v.*
McCLELLAN. } Dec. 1848. 2.

Dear Sir:

Pursuant to the rule of the court, I inclose a copy of the draft of the proposed decree to be entered in this case on Saturday next, pursuant to the minutes furnished by the court.

Very respectfully, your obedient servant,

R. C. McMURTRIE.

JOHN M. SCOTT,
Counsel for Mrs. Carswell.
March 5th, 1850.

Draft.

SHARSWOOD
*v.*
McCLELLAN. }

And now, to wit, the cause having come on to be heard upon bill and answer, it is ordered and declared that Margaret Carswell and Samuel McClellan, defendants, are trustees for the complainants, Mary Ann Ely Miles and Mary Bready, one of the defendants in whom it appears is vested all the interest of the heirs of Clement Lee Bready, in the proportions of their several interests set forth in the mortgage deed by Ezra Stiles Ely to the said Margaret Carswell and Samuel McClelland, dated Jan. 5th, 1838, mentioned in the bill; and she, the said Mary Bready, assenting hereto, and desiring that the conveyance hereby decreed shall be made, it is ordered and decreed that the said defendants, Margaret Carswell and Samuel McClellan, do forthwith execute and deliver unto Thomas J. Miles, trustees, as hereinafter set forth, a deed of conveyance duly executed and acknowledged, for all the lands, tenements, and estate real and personal of every description, mentioned and described in the said mortgage deed, of which they are now seized or professed, or in any manner entitled to under and by virtue of the said mortgage, and also under and by virtue of the deed of the sheriff of Marion County, dated Nov. 17th, 1843, mentioned in the bill in trust for the said Mary Ann Ely Miles and Mary Bready, in the proportions to which they may be respectively entitled under the

trust and provisions of the said mortgage, and in further trust as to the share or proportion of the said Mary Ann Ely Miles, to hold the same under and subject to the trusts declared of and respecting her estate in the deed of marriage settlement, dated October 2d, 1843, mentioned in the bill. And the court do further decree and order that all other matters in issue between the said parties to the said cause, and all other questions thereon arising, and also the question of costs, be reserved for the future disposition, order, and decree of this court.

SHARSWOOD
*v.*
McCLELLAN.

Dear Sir:

Not having received that intimation of the *time* which was required by correct chancery practice, neither of Mrs. Carswell's counsel was present when the "proposed decree" was indicated by the court. Will you please send, for our examination, the "minutes furnished by the court," mentioned in your note? We will be obliged to you also for the date of the decision.

Very respectfully yours,

L. A. SCOTT.

R. C. McMURTRIE, Esq.

March 6th, 1850.

SHARSWOOD
*v.*
McCLELLAN.

Dear Sir:

Fearing that my note of the 6th inst., which was left at your office at 9½ A. M. of that day, has escaped your attention, I take the liberty to ask a reply to it by the bearer, as our exceptions are to be filed to-day.

We conceive that we have the right to examine the minutes furnished by the court of their decree—that they belong to one party no more than to another—and it is impossible for us to say whether the proposed decree is in conformity with our view of the intention of the court without examining that paper. It is not on record. As, however, you may differ with us on this point, and as it is possible that we ought to infer from our not having received any reply to my note that you decline to lend us the paper, I take the liberty to inquire whether this supposition is correct. The bearer will wait for a reply.

Very respectfully, your obedient servant,

L. A. SCOTT.

R. C. McMURTRIE, Esq.

March 8th, 1850.

A note was also addressed to Mr. Biddle on the morning of 8th inst., as follows:

SHARSWOOD
*v.*
McCLELLAND.

Dear Sir:

Fearing that my note of the 6th inst. to Mr. McMurtrie (which was left at his office at 9½ A. M. of that day, and of which a copy is inclosed), has escaped his attention, and finding that he is now out of town, I take the liberty to ask a reply to it by the bearer, as our exceptions are to be filed to-day.

We conceive that we are entitled to see "the minutes furnished by the court" of their decree, they belonging to one party no more than to the other. They are not filed of record. As, however, you may differ with us on that point, and as it is possible that we ought to infer from our not having received any reply to my note that you decline to lend us the paper, I take the liberty to inquire whether this supposition is correct.

The bearer will wait for a reply. Copy of Mr. McMurtrie's note is inclosed.

Very respectfully, your obedient servant,

L. A. SCOTT.

G. W. BIDDLE, Esq.
March 8th, 1850.

*Decree for Conveyance.*

SHARSWOOD
*v.*
McCLELLAN. } In Equity.

And now, to wit, March 12th, 1850,

The cause having come on to be heard on the bill and answers, and it appearing to the court that certain lands, tenements, hereditaments, and personal property were conveyed to Samuel McClellan and Margaret Carswell, by Ezra Stiles Ely, by a mortgage deed, dated January 5, 1838, mentioned in the bill, in trust for Mary Ann Ely Miles, and also for the heirs of Clement Lee Bready, deceased (whose interests are now all vested in Mrs. Mary Bready), in certain proportions as are therein set forth; and it further appearing to the court that the said Mary Ann Ely Miles and Mary Bready are entitled to have a conveyance of the said lands, &c., to a trustee selected by themselves, and it being a question disputed by the parties to the said proceedings, whether the said mortgagees have ever accepted the said conveyances and trusts, so as to be in any way chargeable on that account, and it being expressly denied by Margaret Carswell that she ever either accepted or knew of the ex-

trust and provisions of the said mortgage, and in further trust as to the share or proportion of the said Mary Ann Ely Miles, to hold the same under and subject to the trusts declared of and respecting her estate in the deed of marriage settlement, dated October 2d, 1843, mentioned in the bill. And the court do further decree and order that all other matters in issue between the said parties to the said cause, and all other questions thereon arising, and also the question of costs, be reserved for the future disposition, order, and decree of this court.

SHARSWOOD
*v.*
McCLELLAN.

Dear Sir:

Not having received that intimation of the *time* which was required by correct chancery practice, neither of Mrs. Carswell's counsel was present when the "proposed decree" was indicated by the court. Will you please send, for our examination, the "minutes furnished by the court," mentioned in your note? We will be obliged to you also for the date of the decision.

Very respectfully yours,

L. A. SCOTT.

R. C. McMURTRIE, Esq.

March 6th, 1850.

SHARSWOOD
*v.*
McCLELLAN.

Dear Sir:

Fearing that my note of the 6th inst., which was left at your office at 9½ A. M. of that day, has escaped your attention, I take the liberty to ask a reply to it by the bearer, as our exceptions are to be filed to-day.

We conceive that we have the right to examine the minutes furnished by the court of their decree—that they belong to one party no more than to another—and it is impossible for us to say whether the proposed decree is in conformity with our view of the intention of the court without examining that paper. It is not on record. As, however, you may differ with us on this point, and as it is possible that we ought to infer from our not having received any reply to my note that you decline to lend us the paper, I take the liberty to inquire whether this supposition is correct. The bearer will wait for a reply.

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SHARSWOOD
*v.*
McCLELLAND.

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We conceive that we are entitled to see "the minutes furnished by the court" of their decree, they belonging to one party no more than to the other. They are not filed of record. As, however, you may differ with us on that point, and as it is possible that we ought to infer from our not having received any reply to my note that you decline to lend us the paper, I take the liberty to inquire whether this supposition is correct.

The bearer will wait for a reply. Copy of Mr. McMurtrie's note is inclosed.

Very respectfully, your obedient servant,

L. A. SCOTT.

G. W. BIDDLE, Esq.
March 8th, 1850.

*Decree for Conveyance.*

SHARSWOOD
*v.*
McCLELLAN. } In Equity.

And now, to wit, March 12th, 1850,

The cause having come on to be heard on the bill and answers, and it appearing to the court that certain lands, tenements, hereditaments, and personal property were conveyed to Samuel McClellan and Margaret Carswell, by Ezra Stiles Ely, by a mortgage deed, dated January 5, 1838, mentioned in the bill, in trust for Mary Ann Ely Miles, and also for the heirs of Clement Lee Bready, deceased (whose interests are now all vested in Mrs. Mary Bready), in certain proportions as are therein set forth; and it further appearing to the court that the said Mary Ann Ely Miles and Mary Bready are entitled to have a conveyance of the said lands, &c., to a trustee selected by themselves, and it being a question disputed by the parties to the said proceedings, whether the said mortgagees have ever accepted the said conveyances and trusts, so as to be in any way chargeable on that account, and it being expressly denied by Margaret Carswell that she ever either accepted or knew of the ex-

istence of such a trust. But forasmuch as the said mortgage deed has been recorded, whereby an apparent title in trust as aforesaid has been vested in the said mortgagees, which objection it is desirable should be avoided and quieted, it is ordered, decreed, and declared by the said court, that the said Margaret Carswell and Samuel McClellan do forthwith execute and deliver to Thomas J. Miles, a deed poll duly acknowledged, for all the right, title, and interest, powers and authorities, which may have passed to the said Carswell and McClellan, and may now remain in them, in and over the lands, tenements, hereditaments, and personal estate of every description mentioned or described in the said mortgage deed, and in a certain deed from the sheriff of Marion county, Missouri, dated Nov. 17, 1843, mentioned in the bill, by force and virtue of said deed and said mortgage or either of them, to hold to him the said Thomas J. Miles, his heirs and assigns, in fee simple, in trust, nevertheless, for George Sharswood and Frederick A. Raybold in fee, they being the trustees of Mary Ann Ely Miles, under and by virtue of a deed of marriage settlement, dated October 2, 1843, mentioned in the bill; and also in trust for the said Mrs. Mary Bready, in the several and respective shares, proportions, and interests to which the said Mary Ann Ely Miles and Mrs. Mary Bready are or may be entitled, under and by virtue of the trusts declared in the said mortgage deed dated January 5, 1838, it being hereby expressly declared that the aforesaid decree and conveyance made in pursuance thereof, is not in any wise intended as a recognition or decision of any of the questions in controversy in the said cause, nor is it hereby intended to determine whether the said Margaret Carswell and Samuel McClellan are, or ever have been, trustees under the said deeds, or whether they or either of them have ever accepted the said conveyances and trusts, or are in any way accountable by reason of the said conveyances or any matters relating thereto.

And it is further ordered by the court, that all the questions between the parties to the said cause which are in issue between them on the said pleadings, and particularly the questions whether the said Margaret and Samuel, or either of them, are or ever were trustees, or are or ever were accountable as such, or in any other manner than to be bound in equity to convey, and also the questions of costs are reserved for the further consideration of the court, in the same manner as if the aforesaid order and decree had not been made. And that the cause be ordered for a further peremptory hearing upon all said questions, and upon the pleadings as they now stand, upon the next equity argument list.

*Petition of Margaret Carswell, Respondent.*

Common Pleas. In Equity.

SHARSWOOD et al. v. McCLELLAN et al. } T. 184 . No.

To the honorable the judges of the Court of Common Pleas for the City and County of Philadelphia, in equity sitting.

The petition of Margaret Carswell, one of the respondents in the above-mentioned cause, respectfully shows, that your honors having made a decree for conveyance by her (as is offered in her answer, on file among the records of your honorable court), and by Samuel McClellan, another of the respondents, your petitioner, in obedience to said decree, executed, acknowledged, and delivered promptly and without delay a conveyance in the terms prescribed by said decree. Said conveyance was executed by her on the day of A.D. , and she has been informed and believes that the said Samuel McClellan has since executed it.

Your petitioner therefore prays that she may be dismissed and discharged from the said suit, and that she may be allowed her reasonable costs in that behalf most wrongfully sustained.

MARGARET CARSWELL.
J. M. SCOTT,
L. A. SCOTT,
For Margaret Carswell.

*Final Decree.*

In the Court of Common Pleas of Philadelphia County. In Equity.

SHARSWOOD and others v. McCLELLAN and others. } Of December Term, 1848. No. 2.

This cause came on again to be heard on bill and answer, and was argued by counsel, and it appearing that the conveyance heretofore ordered and directed to be made by the court in pursuance of the prayer of the complainants' bill, and of the offer of the defendants in their answer, has been duly executed and delivered by the respondents McClellan and Carswell, and the court having now considered the residue of the matters in said complainants' bill contained, and the answers thereto, do now, this twenty-second day of February, A.D. 1851, order, adjudge, and decree, that the complainants' bill, as to all the said residue thereof, do stand absolutely dismissed out of court, but without any decree or allowance of costs against the said complainants or any of them, in favor of the said respondents or any of them.

Suggestion of death of F. A. Raybold, a party complainant, and of Mrs. Margaret Carswell, a party defendant.

Common Pleas, in Equity. December Term, 1848.

SHARSWOOD et al. v. McCLELLAN et al. } No. 2.

The death of Frederick A. Raybold, a party complainant in this suit, and the death of Mrs. Margaret Carswell, one of the parties, defendant in this suit, are suggested as having occurred after the decree made, therein dismissing the bill and before the filing of the bill of revivor.

GEO. W. BIDDLE,
Solicitor of Complainant.

January 31, 1853.
To the Prothy. of C. P.

*Appeal of George Sharswood.*

Bill of Revivor.

To the Honorable the Judges of the Court of Common Pleas of Philadelphia County, sitting in Equity.

Common Pleas. In Equity. Original suit. Dec. Term, 1848.

GEORGE SHARSWOOD, who survived FREDERICK A. RAYBOLD, trustees of MRS. MARY ANN ELY MILES, THOMAS J. MILES, and the said MARY ANN ELY MILES, his wife,
*against*
JONATHAN J. ROBINSON, executor of the last will of Mrs. MARGARET CARSWELL, deceased, who was a party defendant in her lifetime with SAMUEL McCLELLAN, EZRA STILES ELY, and Mrs. MARY BREADY. } No. 2.

Bill of Revivor.

And thereupon your orators, the said George Sharswood and others, say that on or about the eleventh day of November 1848, your orators exhibited their original bill of complaint in this honorable court, against Mrs. Margaret Carswell and Samuel McClellan, Ezra Stiles Ely, and Mrs. Mary Bready, as the defendants thereto, thereby stating such several matters and things as are therein particularly mentioned and set forth; and your orators further show, that the said Margaret Carswell being duly served with process, appeared and put in her answer to said original bill, and the said other defen-

dants also put in their answers to the said bill, and afterwards the said cause came on to be heard on or about June term, 1850, when this honorable court did order and decree that the said bill should be and stand dismissed, as in and by the said bill and answers, order, and other proceedings now upon the records of this honorable court will appear. That your orators were minded and desirous of appealing from the said decree dismissing the said bill as aforesaid, but that afterwards and before the said appeal had been duly prosecuted, and any further or other proceedings were had in the said cause, the said Margaret Carswell departed this life, having first duly made and published her last will in writing, dated the seventh day of January, 1846, and thereof appointed Jonathan J. Robinson, executor, who duly proved the same on the fourteenth day of May, 1851, in the proper office, and took upon himself the execution thereof, and the said suit and proceedings having become abated as to the said Margaret Carswell by her death as aforesaid, your orators are advised that they are entitled to have the same revival against the said Jonathan J. Robinson, as her executor.

To the end, therefore, that the said suit and proceedings which became so abated as aforesaid as to the said Margaret Carswell by her death as aforesaid, may stand and be revived against the said Jonathan J. Robinson, and be in the same plight and condition as the same were in at the time of the abatement thereof, so that your orators may be enabled to prosecute their appeal as aforesaid, and that your orators may have the benefit thereof, or that the said defendant Jonathan J. Robinson may show cause why the said suit and proceedings should not be so revived, and that the same may be revived accordingly, may it please your honors to grant unto your orators a writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the said Jonathan J. Robinson, thereby commanding him, at a certain day and under a certain penalty to be therein limited, personally to be and appear before this honorable court, and then and there full, true, direct, and perfect answer make to the aforesaid bill of revivor, and all and singular the premises; and further, to stand to perform and abide such further order, direction and decree therein, as to your honors shall seem meet, and your orators will ever pray, &c.

G. W. BIDDLE,
W. L. HIRST,
Counsel with Plaintiffs.

January 25, 1853.

[SEAL.] State of Pennsylvania, City and County of Philadelphia, *ss.*

The Commonwealth of Pennsylvania, to Jonathan J. Robinson, executor, of the last will of Mrs. Margaret Carswell, deceased, who

was a party defendant in her lifetime with Samuel McClellan, Ezra Stiles Ely, and Mrs. Mary Bready.

We command you, that you personally be and appear before the judges of our Court of Common Pleas for the city and county of Philadelphia, at a court to be holden at Philadelphia, in and for said city and county, on the first Monday of February next, to answer a bill of complaint exhibited against you in our said court, by George Sharswood, who survived, Frederick A. Raybold, trustee of Mrs. Mary Ann Ely Miles, Thos. J. Miles, and the said Mary Ann Ely Miles his wife.

And to do further, and to receive what our said court shall have considered in this behalf. And this you are not to omit, under the penalty of four hundred dollars.

Witness the honorable Oswald Thompson, president of our said court at Philadelphia, this 29th day of January, in the year of our Lord 1853.

Memorandum.—The defendants are to enter their appearance in this suit in the prothonotary's office, on or before the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

E. M. DANDS,
Pro'ty.

Served by giving a true and attested copy of the writ to Jonathan J. Robinson, January 29, 1853, at ½ past 1 o'clock P. M., and making known to him the contents thereof. So answers

SAML. G. RUGGLES,
Deputy Sheriff.

*Demurrer.*

C. P. In Equity.

SHARSWOOD et al. *v.* ROBINSON et al. } Dec. T. 1852. No. 27.

The demurrer of Jonathan J. Robinson, defendant, to the bill of revivor of George Sharswood and others, complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained, to be true, in such manner and form as the same are therein set forth, doth demur thereto, and for, cause of demurrer showeth:

That it appears by the said bill of revivor, and by the said therein referred to record, and proceedings of the said original suit, that the said suit was fully and completely terminated and ended by a decree of this honorable court, pronounced upon the 22d day of February, A.D. 1851, after full hearings upon bill and answer, by which decree the said original bill was dismissed upon the merits,

and from which decree the said complainants might at any time have appealed, and may still appeal; wherefore the said defendant submits that he is not now to be harassed by the said bill of revivor, filed in this honorable court, but that, if the said suit can be revived against him, it should be done in the appellate court, after an appeal duly taken and perfected by the said complainants; and he further submits that the said suit cannot be revived against him until the said appellate court shall have reviewed the decision and decree of this honorable court therein, nor ever.

And for further cause of demurrer, the said defendant shows that it appears by the said record and proceedings, that the said original suit was brought for an account against the said Margaret Carswell (of whom this defendant is executor), and Samuel McClellan, who still survives, by the said complainants, who in their said bill alleged that the said Margaret Carswell and Samuel McClellan were trustees under a certain mortgage therein mentioned, made by Ezra Stiles Ely to them jointly, in trust, and who claimed to hold the said Margaret Carswell and Samuel McClellan to an account as such trustees. That inter alia it further appears by the said record and proceedings, and by the answers therein, to which no replication was filed, that the said Margaret Carswell *never acted in, nor accepted, nor knew of the said mortgage or trust*, and never received, nor had the control of any money or property thereunder; wherefore, this defendant submits that the said suit, if it is not to be considered as ended, nevertheless survives, and is to be carried on in the said appellate court against the said alleged surviving trustee, the said Samuel McClellan, and the other defendants alone, and cannot now be revived against this defendant. And for further cause of demurrer, the said defendant shows and submits, that the proper mode of reviving the said original suit, if it can now be revived against this defendant at all, is under the laws and acts of Assembly of this commonwealth, and the practice in the courts of equity of the said commonwealth, by scire facias, and not by bill of revivor. And for further cause of demurrer, the said defendant shows that all the defendants in the said original suit ought to be made parties to the said bill of revivor; wherefore, and for divers other defects and causes of demurrer appearing in the said bill of revivor, this defendant doth demur thereto, and humbly demands the judgment of this honorable court, whether he shall be compelled to make any answer to the said bill of revivor, and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

J. M. SCOTT,
L. A. SCOTT,
For Defts.

Philadelphia, *ss.*

Jonathan J. Robinson, the above-named defendant, being duly sworn says, that the above demurrer is not interposed for delay.

J. J. ROBINSON.

Sworn and subscribed this 11th day of February, 1853, before me,

JOHN A. WHITE,
Ald.

We certify that, in our opinion, the above demurrer is well founded in point of law.

L. A. SCOTT,
J. M. SCOTT.

Feb. 11, 1853.

*Answer.*

In Equity. Bill of Revivor.

SHARSWOOD
*v.*
ROBINSON.

Dec. T. 1852. No. 27.

The answer of J. J. Robinson, executor of Mrs. Margaret Carswell, deceased, to the bill of revivor of the said plaintiff.

The said respondent, his demurrer to the bill of revivor being overruled by the court, not waiving any right or question under the said demurrer, and hereby expressly reserving and claiming all benefit and advantage thereof, and of all the manifold uncertainties, contradictions and imperfections of said bill of revivor, for answer thereunto, saith:

That true it is, that said Margaret Carswell died, leaving a will, of which a copy is hereto annexed, which copy respondent prays may be taken as part of this answer. That, under the said will, several parties are interested as legatees or devisees of the said Margaret Carswell, to wit: Margaretta Lamb, Margaret C. McClellan, Matthew W. Carswell, Mary Ann Ely Carswell, Mary Stuart Elliot, The American Board of Foreign Missions, The American Board of Domestic Missions, The American Bible Society, The Educational Society, all which said parties, this respondent says, ought to be made parties to the said bill of revivor; and he prays as full benefit of this objection as he could have if the same were made in any other way or mode whatever.

And the said respondent saith, that he cannot tell how large a sum the claimants may pretend to demand against the estate of the said testator, and he therefore pleads and avers that he hath not assets or effects of the said Margaret Carswell suffiicient to answer the said claim; and that there are other claims against the estate

of the said Margaret far greater in amount than the whole of the assets of the said estate, and he claims full benefit and advantage of the said plea, in this and every subsequent stage of this cause, and is ready to account for the assets and effects of the said Margaret, possessed by him or for his use, in such a manner as the proper court may direct, and hath heretofore filed an account of the same, which has been duly audited and confirmed, &c.

J. J. ROBINSON.

J. M. SCOTT,
L. A. SCOTT,
For Defts.

J. J. Robinson being duly says, that the facts stated in the above answer are true.

J. J. ROBINSON.

Sworn and subscribed this 28th day of May, A.D. 1853, before me.

G. W. CARPENTER,
Prothy.

*Copy of Will.*

Be it remembered, that I, Margaret Carswell, of the city of Philadelphia, widow of Samuel Carswell, late of the same city, deceased, being of sound disposing mind, memory and understanding, do make, publish, and declare this my last will and testament in words and manner following, that is to say:

Imprimis. I direct that all my just debts and funeral expenses be fully paid as soon after my decease as may be practicable.

2d item. I give and bequeath unto my daughter, Margaretta Lamb, and my granddaughter, Margaret C. McClellan, all my wearing apparel, and my curtains and bed and table linen, to equally divided between them.

3d item. I give, devise, and bequeath unto my daughter, Margaretta Lamb, and to her heirs and assigns forever, all that certain tract of land, situate in and being the S. E. quarter of section numbered 9, in township numbered 56 north of the base line, in range numbered 7 west of the 5th principal meridian, in the district of lands sold by the United States, at the office in Palmyra, Missouri.

4th item. I give to my son, Jonathan John Robinson, in trust for my son Matthew W. Carswell, my gold watch, and all my silver plate of every description, except the spoons, hereafter disposed of to Mary Ann Ely Carswell.

5th item. I give, devise, and bequeath unto my granddaughter, Mary Stuart Elliot, the sum of one thousand dollars (out of the mortgage debt due me, secured on a church edifice, in the district

of Southwark), to be held and enjoyed by herself and her heirs after her.

6th item. I give, devise, and bequeath unto my granddaughter, Mary Stuart Elliot, and her heirs and assigns forever, all that certain lot or tract of land situate in Marion county, Missouri, known as the N. W. quarter of section numbered 13, in township numbered 57 north of the base line, in range numbered 7 west of the 5th principal meridian.

7th item. I give and bequeath unto my granddaughter, Mary Ann Ely Carswell, half a dozen silver teaspoons.

8th item. I give, devise, and bequeath unto my son, Jonathan John Robinson, his heirs and assigns forever, in trust for the American Board of Foreign Missions, and the American Board of Domestic Missions, each to have an equal interest therein, one-fourth of a tract of land lying in Marion county, Missouri, being a moiety of the fractional section numbered 33, and a part of a section numbered 32, in township numbered 59 north of the base line, in range numbered 5 west of the 5th principal meridian, in the district of land offered for sale by the United States, at Palmyra, which moiety is to be taken from the south side of my part of the said section. And I do hereby give unto the said Jonathan J. Robinson, his heirs and assigns, full power and authority to sell and dispose of the said land to such person and persons, and at such time, and for such price or prices as he may think best, and full and perfect conveyances thereof to make to the purchaser or purchasers, in fee simple, without any liability on the part of such purchaser or purchasers for the application, misapplication, or nonapplication of the proceeds. And I direct the said proceeds of such sale to be applied by the said trustee as above, that is to say, half to the Am. Board of Foreign Missions, and half to the Am. Board of Domestic Missions.

9th item. I give and bequeath unto the Am. Board of Foreign Missions the sum of two hundred dollars; to the Am. Board of Domestic Missions the sum of two hundred dollars; to the Am. Bible Society the sum of two hundred dollars; to the Educational Society the sum of two hundred dollars.

10th item. I give, devise, and bequeath, unto my son, Jonathan John Robinson, his heirs and assigns, forever, all the rest, residue, and remainder of my estate, real, personal, and mixed, of whatever kind the same may be, and wheresoever situated. And I do hereby nominate, constitute, and appoint the said Jonathan J. Robinson sole executor of this my last will and testament, hereby revoking all others heretofore made.

In witness whereof I have hereunto set my hand and seal, seventh day of January, in the year of our Lord one thousand eight hundred and forty-six, 1846.

MARGARET CARSWELL.

Signed, sealed, published, and declared by the said Margaret Carswell, as and for her last will and testament, in presence of us, who at her request, and in her presence and in presence of each other, have set our hands as witnesses to the same.

MARGARET C. LAMB.
RUHANNAH FULLER.
MARGT. ELLIOTT.

Proved May 14, 1851.

Court of Common Pleas of Philadelphia County. In Equity.

GEORGE SHARSWOOD, who survived, &c., and others,
*v.*
JONATHAN J. ROBINSON, Executor of the last will of Mrs. MARGARET CARSWELL, deceased, &c.

Original Suit. December Term, 1848. No. 2.
Bill of Revivor, December Term, 1852. No. 27.

*Decree.*

This cause came on to be heard on bill of revivor and on demurrer thereto, and was argued by counsel, and the court having considered the same, did on the 14th day of May, A.D. 1853, order, adjudge, and decree, that the demurrer of Jonathan J. Robinson, executor of the last will of Mrs. Margaret Carswell, who was a party defendant in her lifetime to the original suit, should be overruled, with leave to the said executor to file an answer to the said bill of revivor, and an answer was filed accordingly; and afterwards the same cause came on again to be heard on bill of revivor and answer, and was argued by counsel, and the court having considered the same, do now, on Wednesday, the 22d day of June, A.D. 1853, order, adjudge, and decree, that the said original suit and proceedings referred to in the said bill of revivor, shall and do stand, and be and hereby are revived against the said Jonathan J. Robinson, executor of the last will of the said Margaret Carswell, deceased, as aforesaid, and be and are in the same plight and condition as the same were at the time of the death of said Margaret Carswell.

Eastern District of Pennsylvania, *ss.*

The Commonwealth of Pennsylvania, to the Justices of the Court of Common Pleas for the City and County of Philadelphia, greeting:

We being willing, for certain causes, to be certified of the proceedings in the matter of the appeal of Jonathan J. Robinson, exe-

cutor of Margaret Carswell, deceased, from your decree in the case of George Sharswood, who survived Frederick A. Raybold, trustees of Mrs. Mary Ann Ely Miles, Thomas J. Miles, and the said Mary Ann Ely Miles, his wife, *v.* the said Jonathan J. Robinson, executor of the last will of Mrs. Margaret Carswell, deceased, was [SEAL.] a party defendant in her lifetime with Samuel McClellan, Ezra Stiles Ely, and Mrs. Mary Brady (in Equity, Dec. T. 1852, No. 27), before you, or some of you, depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our Supreme Court of Pennsylvania, at a Supreme Court, to be holden at Philadelphia, in and for the Eastern District, the second Monday of December next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon, that which of right and according to the laws of the said State ought.

Witness the Honorable Jeremiah S. Black, Esq., chief justice of our said Supreme Court, at Philadelphia, the eighth day of November, in the year of our Lord one thousand eight hundred and fifty-three.

Allowed by

RO. TYLER,
Prothonotary.

To the honorable judges within named, the annexed record, with all things touching the same, we send as within we are commanded. So answers,

OSWALD THOMPSON, [SEAL.]
JOS. ALLISON, [SEAL.]

Indorsed: Term 185 . Supreme Court. Certiorari to the Court for the County of returnable the day of 185 . Rule, on the appellee to appear and plead on the return day of the writ.

The Commonwealth of Pennsylvania, City and County of Philadelphia, *ss.*

I, James G. Gibson, Esquire, prothonotary of the Court of Common Pleas for the City and County of Philadelphia, do certify that the foregoing is a true copy of the record in the case there stated.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court the 3d day of October, eighteen hundred and fifty-six.

JAS. G. GIBSON,
Prothonotary.

City and County of Philadelphia, *ss.*

I, Oswald Thompson, Esquire, president of the Court of Common Pleas for the City and County of Philadelphia, do certify that the foregoing record and attestation, made by James Gibson, Esquire, prothonotary of said Court of Common Pleas, whose name is thereto subscribed, and seal of office affixed, are in due form and made by the proper officer.

In testimony whereof I have hereunto set my hand the third day of October, eighteen hundred and fifty-six.

OSWALD THOMPSON.

City and County of Philadelphia, *ss.*

I, James G. Gibson, Esquire, prothonotary of the Court of Common Pleas for the City and County of Philadelphia, do certify that the Honorable Oswald Thompson, Esq., by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is, president judge of the Court of Common Pleas for the City and County of Philadelphia, duly commissioned and sworn, to all whose acts, as such, full faith and credit is and ought to be given, as well in courts of justice as elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court the 3d day of October, eighteen hundred and fifty-six.

[SEAL.]

JAS. G. GIBSON,
Prothonotary.

*Agreement to correct error in record.*

I, Benjamin F. Hickman, clerk of the United States circuit court for the districts of Missouri, do certify that among the papers and documents incorporated into the record in the case of Thomas J. Miles, appellant, *vs.* Wm. D. Caldwell, appellee, transmitted to the Supreme Court of the United States on appeal from the circuit court of the United States for the districts of Missouri, aforesaid, was a deed of trust or mortgage from Ezra Styles Ely to Margaret Carswell and Samuel McClellan, dated January 5, 1838, and purporting to have been acknowledged on the sixth day of January, 1838, before Allen G. Gallaher, J. P., and that it appears from the original paper now before me that the same was filed for record in the office of the recorder of deeds for Marion county, Missouri, on the (8th) eighth day of January, eighteen hundred and thirty-eight (1838;) and that the memorandum, to be found on page 63 of the printed record of the case of Miles *vs.* Caldwell, being No. 256, December term, 1860, of the U. S. Supreme Court, is erroneous, and the fruit of a clerical error, said memorandum setting forth that said deed was "filed for record 8th day of January, 1856."

BEN. F. HICKMAN, *Clerk.*

Feb. 18, 1864.

In the Supreme Court of the United States—December term, 1863.

THOMAS J. MILES, appellant,
*vs.*
WM. D. CALDWELL, appellee.

I, James S. Green, of counsel for the appellee in the above-entitled cause, do hereby consent that the record may be corrected, in conformity with the above certificate of B. F. Hickman, clerk, without the formality of a certiorari.

JAMES S. GREEN,
*Attorney for Appellee.*

Filed March 1, 1864.

Ex parte: Fleming in re Doulle
et al v La Crosse & Milwaukee
R R Co et al 1

US v Guadalupe Mining Co
157

Miles v Caldwell 435

Harvey v Tyler 698

Hawkins v Fowler 809

Steamship Co. v [illegible] 845

Whalen & Wilson Mfg Co v Corliss
917

Parmelee v Jones 1243

U.S. v Hone 1427

The Circassian 1477

Bowler v Bangs 1697

Jobey v [illegible] s 1767.

Freeborn v Smith 2 55

Derby and Day v Gallup 2 335

Merriam v Hadl 2 405

Marine Bank of Chicago v Fulton County Bank 2 591

# In the Supreme Court of the United States.

THOMAS J. MILES, APPELLANT,
VERSUS
WILLIAM D. CALDWELL, APPELLEE.

*On Appeal from the Circuit Court for Missouri.*

## STATEMENT OF THE CASE.

Caldwell filed a bill on the equity side of the Circuit Court of the United States for Missouri to enjoin proceedings upon a judgment in ejectment, and for general relief. Miles had obtained at the October Term 1856, a verdict in ejectment, which on motion for a new trial the court refused to disturb. Thereupon judgment was rendered upon the verdict, and Caldwell filed his bill, setting forth that one Rhodes Gentry being seized of a large tract containing the premises in controversy, sold and conveyed ~~them~~ the whole to one Ezra Styles Ely on the 4th of September, 1835. That by deed of mortgage, dated November 18, 1837, Ely conveyed the premises to one James Gallaher, to secure a debt of $2,866 97, and eight per centum per annum interest, for which a note was executed by Ely. That on the 5th May 1841, Ely confessed judgment in favor of Gallaher for the amount of the note and interest. That in April 1842 an execution issued on this judgment, and that this execution was, by the consent of Ely, levied on the mortgaged property, which was after advertisement sold for $350 50 to Gallaher, who received the Sheriff's deed therefor. That after this sale its validity was expressly recognised by Ely, in this, that he on November 1, 1843, made with

Gallaher an agreement in writing, by which it was stipulated, that if the said Ely should within the term of three years pay to Gallaher the amount including interest and costs of the said judgment, then Gallaher should convey to Ely, or his assigns, all the lands by him purchased at Sheriff's sale under said judgment. It was also witnessed by said agreement, that on the day of its date Ely had delivered to Gallaher six shares of the Jefferson Medical College stock, amounting to three thousand dllars, which were to be credited upon said judgment. That when the term of three years had nearly expired, Ely was bankrupt, the land had depreciated in value, and Gallaher agreed with one James H. Patterson to convey to him the property described in the mortgage, upon the payment by Patterson to him of the balance due on the mortgage debt and interest, provided Ely would consent thereto. That Ely did consent thereto in writing, and thereupon Gallaher conveyed said land to Patterson for $955 91, by deed dated October 31, 1846. That on the 5th November 1846, Patterson conveyed the said land to one Tatlow for value; and that on September 22, 1849, Tatlow conveyed the premises in controversy, being 80 acres of land, to the plaintiff Caldwell, by a deed with covenant for title. That the written consent of Ely to the conveyance from Gallaher to Patterson was lost or mislaid, and thereupon Ely, by deed dated January 15, 1850, by quit claim deed released all his right in said mortgaged premises to said Tatlow for $200.

That in February 1850 Caldwell took possession of the part sold by him, purchased from Tatlow, and has ever since held possession of it, and improved the same, putting thereon valuable and permanent improvements of various kinds, mentioned in the bill; which improvements are all stated to have been made in good faith by Caldwell, he supposing the land to belong to him.

The bill then goes on to state, that in the year 1836 and 1837, Ely was in debt greatly beyond his means of payment, and that on 22d November, 1837, he made and delivered to Margaret Carswell, his mother-in-law, and Samuel McClellan, his son-in-law, of Philadelphia, Pennsylvania, a deed of trust, whereby it was recited that he and the Government of the United States and the banks throughout the country had stopped payment, and

that he was afraid that some of his creditors might sacrifice his property, wherefore he conveyed to said Carswell and McClellan a very large amount of property, including the land mortgaged to Gallaher upon trusts, which were, virtually, all for the benefit of Ely and in prevention or hindrance of his creditors.

That on the 5th of January, 1838, Ely made and delivered another deed to Carswell and McClellan, reciting that he had previously made deeds of assignment bearing date November 22 and December 7, 1837, which had been filed for record in the counties of Ralls and Marion, and that he was advised by counsel that said deeds were void, for which reason he made the deed of trust of date January 5, 1838. That he was indebted in the sum of $30,000 and interest for several years, to his ward Mary Ann Ely Carswell, and in not less than $4000 to his wards, the children of Clement Lee Brady, to secure which he conveyed to Carswell and McClellan a large amount of real estate, including the mortgaged premises, and also a large amount of personal property consisting of choses in action, due at the time—the unexpired term of service of a slave not having five years to run, horses and mares, bricks in the kiln, a quantity of corn, hay and oats, work-oxen, cattle, sheep, swine, all his rents for the ensuing five years, all the increase of his cattle, the crops of his cultivated fields, farming implements, household and kitchen furniture, &c.; and the bill charges that the greater part of this personalty was perishable, and that by the terms of the deed it was provided that no part of it should be applied to the payment of the debts to his wards until the end of five years, and then, if the said debts were paid, the deed should be void. It was further alleged that this deed was written out by Ely over an acknowledgment previously prepared and dated January 6, 1838. This deed, the bill states, was recorded on the 8th day of January, 1838, in the proper office.

All the deeds mentioned in the bill, from first to last, were, the bill states, duly acknowledged and recorded within a few days of their execution respectively. The bill charges that the deed of November 22, 1837, was made and contrived by Ely to hinder, delay and defraud his creditors, and that the deed of January 5,

1838, was made and delivered, had and contrived by and between Ely and the said McClellan and Carswell, to delay, hinder and defraud the creditors of Ely and any purchaser from him. That in August 1848 said Carswell and McClellan further combining to consummate and carry out the fraud intended, caused proceedings to be set on foot in the Circuit Court of Marion county, Missouri, to procure a formal foreclosure of the mortgage deed of January 5, 1838. Said Carswell and McClellan presented their petitition in said court, asking the foreclosure of said morigage, and Ely voluntarily appeared, confessed the action and consented to the order for the sale of the mortgaged premises, which in Missouri takes the place of the old chancery decree of foreclosure. That judgment was accordingly given against Ely for the debt and costs, and an order was made for the sale of the mortgaged premises, &c. At this sale the land mortgaged to Gallaher was purchased by Carswell and McClellan for 50 cts., and the other lands at similar rates, and the Sheriff made a deed therefor to Carswell and McClellan accordingly, bearing date November 17, 1848. That on the 27th of March, 1850, Carswell and McClellan made to the defendant Thomas J. Miles a deed conveying to him all the lands so by them purchased—that said deed was without valuable consideration, and that Miles had at the time notice of all the frauds above alleged.

That on the 12th of September, 1855, Miles sued Caldwell in ejectment in this court, and obtained a verdict and recovered judgment against him for the possession of the said eighty acres, and for $540 and damages for the detention thereof, and that it was further found by the verdict, that the monthly value of the premises was eight dollars.

The bill then states that Miles has no title to the property, and that Caldwell is informed and believes that by suing him again, he could recover back the possession from Miles, but that such a proceeding would not quiet the title, and so he adopts the course of bringing him into a Court of Equity; and accordingly he asks that Miles be enjoined from issuing execution on the said judgment till the final decree in this cause, and that the mortgage deed of January 5, 1838, and the Sheriff's deed of No-

vember 17, 1843, may be declared null and void; or if Caldwell be not so entitled, then that Miles may be decreed to release to him all right to the eighty acres conveyed by Tatlow and Caldwell; or if Caldwell be not so entitled, that Miles, before taking possession, be decreed to account and allow for all permanent and valuable improvements made by Caldwell, and for general relief, &c.

The answer of Miles, after a general denial of all the equity in the bill, proceeded to state the facts of the case out of which the equities of the defendent arose, which were, shortly, (p. 14 of record,) that in the year 1822 one Samuel Carswell, a wealthy merchant of Philadelphia, died, leaving four surviving children, among whom he divided by will an estate estimated at, and actually worth, four hundred thousand dollars ($400,000.) Of these children, the youngest, Samuel Kinsey Carswell, was, at the time of his father's death, a minor. The portion of the estate given to Samuel Kinsey Carswell, was bequeathed in trust for him to Ezra Styles Ely; an estate for life was given to Samuel K. Carswell, with remainder to his children. The terms of the trust were, that so long as Samuel Kinsey Carswell should remain unmarried, he should receive annually one-third of the interest of his estate; the residue of the income was to be capitalized by Ely. The whole of the trust estate was personal and mixed property. This Ezra Styles Ely is the same Ely that is mentioned in the bill of complaint. Samuel Kinsey Carswell afterwards married and died in 1829, leaving a widow and one child, named Mary Ann Ely Carswell. The widow died in August 1830, and her infant, then two years and three months old, passed to the guardianship of the same Ezra Styles Ely, by the will of her father Samuel Kinsey Carswell, who constituted him guardian in case his widow should die during the non-age of his daughter. Ely assumed the duties of this guardianship.

In 1835 this gentleman (who was a son-in-law of Samuel Carswell and brother-in-law of Samuel Kinsey Carswell,) removed with his family and his ward to Marion county, Missouri, taking with him about forty thousand dollars, part of the fortune of his infant ward, in money, or stocks easily convertible into

money. He invested this sum in lands in Missouri, in his own name, taking no precaution to declare the trusts in favor of his ward, and treating the land as if it belonged to him alone. Ely was at this time minister of the gospel, and had been and then was reputed a man of learning and integrity; but he was a visionary, unpractical and confiding man, and believed, that he would by these investments not only secure the fortune of his ward, *but realize a large fortune for himself.* All the investments spoken of were made with the fortune of his ward. He fell into the hands of some of the sharpest of the sharpers of Missouri, and in the fall of 1837 suddenly found himself in such circumstances as endangered the fortune of his ward Mary Ann Ely Carswell. He was at this time largely embarrassed, but considered himself able to pay all his debts, if his property was not sacrificed. He wished in particular to secure the debt he owed his ward, and in November 1837, being ignorant of every legal form, but imagining himself capable, without assistance, of drafting any legal instrument, he, intending to provide equitably and fairly for all his creditors, made the deed which is described as of that date in the bill of complaint. This deed was full of legal solecisms, owing to the ignorance of Ely, but was not executed with a fraudulent purpose. Shortly after this deed was made, he was informed that it was not conformable to law; whereupon he took counsel of Edward Bates, one of the most eminent lawyers of Missouri, by whose advice, in pursuance of his design of preferring and providing for his orphaned ward, he executed the deed bearing date January 5, 1838, which is made an exhibit of defendant's answer. In this deed, reciting a debt to his ward Mary Ann Ely Carswell, the principal sum of which is thirty thousand dollars, with interest for several years, and also a debt to the children of Clement Lee Brady, late of Philadelphia, deceased, and that these debts were of peculiar sanctity, he conveyed to Mrs. Margaret Carswell, his mother-in-law and paternal grand mother of Mary Ann Ely Carswell, and to Samuel McClellan, an eminent physician of Philadelphia, a large amount of of real and personal property (including the tract of 447 acres, purchased as aforesaid, of Rhodes Gentry, and described in the

bill of complaint as the Gentry farm,) in trust, to secure the payment of the said debts to his said ward, within five years from the date of the deed; which deed was made, acknowledged and delivered, in good faith, for the purpose of securing the most sacred claims existing against him, conveying for that purpose, property, which, though supposed at the time to be adequate for that end, proved afterwards very insufficient. The defendant denies that this deed was made to hinder or delay any creditor, but declares, that it was made in sincerity and good faith to secure a most meritorious debt, and that the length of time to elapse between the date and foreclosure of the deed was suggested by the tender years of his ward, (she being less than nine years old.) At the date of this deed the debt of Ely to both Mary Ann Ely Carswell and the children of Clement Lee Brady was much greater than is therein stated. This deed did not embrace all the property and land standing in Ely's name, the deed of November 1837 itself embracing upwards of 1200 acres, not included in that of January following. That at the date of the said deed (Jan. 5, 1838,) Ely was seized of upwards of 2000 acres of land in Marion and the adjoining county, in Missouri, which were not covered by this deed. The defendant denies that either Mrs. Carswell or Dr. McClellan combined with Dr. Ely to defraud his creditors, then, or at any other time, but says that they received the said deed in good faith and unsuspecting confidence, for the use of the beneficiaries, some time after it was made, the deed not being delivered to them as soon as it was made, though immediately recorded. That fraud will hardly be imputed to a child of less than nine years of age, which was the case of Mary Ann Ely Carswell. That the children of Clement Lee Brady were all minors, residents of Philadelphia. That the deed was made, acknowledged and recorded in Missouri, and there kept for some time, and that the minor wards so far from being engaged in a design (in concert with their grandmother and others,) to defraud the creditors of Ely, were of too tender years to be aware either of their own rights or of the danger that threatened them.

On the 2d of October, 1843, Mary Ann Ely Carswell became the wife of the defendant, a marriage contract being first

executed whereby all her estate was conveyed to George Sharswood and Frederick A. Raybold for the benefit of her and her children. Sharswood and Raybold afterwards cited Ely to account, as guardian, for the estate of Mary Ann Ely Carswell, now Mary Ann Ely Miles. By the proceedings had in that cause, Ely was shown to be indebted to his ward in a sum exceeding $56,000. Ely claimed a credit of $7000, and threatened an appeal for its disallowance; whereupon the trustees threw off $7000, and judgment was rendered against him for $49,869 51, the trustees not caring to protract a useless litigation, for it was then apparent (October 21, 1846,) that Ely was hopelessly insolvent.

In 1843 Carswell and McClellan took steps to foreclose the deed of mortgage of January 5, 1838, and obtained judgment against Ely, under which the tract of 447 purchased from Rhodes Gentry, as aforesaid, was sold to them by the Sheriff of Marion county. At the time this judgment was rendered, the debt owing from Ely to Mary Ann Ely Carswell greatly exceeded that for which judgment was rendered. This judgment was confessed by Ely. It was a fair, *bona fide* procedure to provide as well as his means, then greatly impaired, would permit for the realizing of the security given for the debts due to his wards. The proceedings, Sheriff's deed, &c., are made part of the answer.

In November 1848 George Sharswood and Frederick A. Raybold filed their bill in the Philadelphia Court of Common Pleas, against Samuel McClellan and Mrs. Margaret Carswell, to compel them to convey to whomsoever the court might appoint, all their interest under the said mortgage and the lands purchased thereunder, and such proceedings were had, that on the 2nd of March, 1850, in obedience to a decree of said court, the said Carswell and McClellan conveyed to the defendant all the said lands and real estate, including the land described in complainant's bill, in trust, for the purposes mentioned therein. The whole record of said cause in the Court of Common Pleas, is made an exhibit, for the purpose of exhibiting the relations of the said trustees to Mary Ann Ely Carswell.

The defendant admits that he did in 1855 commence an action of ejectment against the complainant for part of the land

thus conveyed to him by Carswell and McClellan, and that at the October term, 1856, of the U. S. Circuit Court for Missouri, he obtained judgment therefor against complainant. And respondent says, that at this trial every material matter and thing now set up by the complainant in his bill as a ground of equitable relief, was set up by way of defence to the recovery of the said respondent (except the claim for improvements, about which more will be said presently); and respondent says, that the jury on that occasion negatived all the pretences, assertions and inunendoes of fraud on the part of Mrs. Carswell and Dr. McClellan which are now repeated and imputed to them in the bill of complainant. And that the matter in said bill set forth and contained were all available (if true) to defeat the said action of ejectment; and that complainant sought by all available means to make use of them at such defence to said action, and did interpose the said defence fully, and give evidence the object of which was to establish the truth of the same, which evidence so given was encountered and overthrown by other evidence offered by the said respondent; and the jury empannelled in said ejectment suit did decide upon the said evidence, and did give a verdict thereupon against the said complainant and in favor of this respondent; and respondent invokes this determination and adjudication of the matter now sought to be tried again on the chancery side of this Court, as conclusive and binding on both parties, and as decisive against the right of the complainant.

Respondent denies that the deed of January 1838 was executed with intent to defraud, hinder or delay the creditors of Ely. He says, that the property therein described was too little to pay the debts owing to said Mary Ann Ely Carswell and the children of Clement Lee Brady, wards of Dr. Ely, and that the mention and inclusion of perishable property (of which the amount was very small) in said deed, proceeded more from inadvertence and ignorance than any other motive, and that the only object of Ely in making that deed was to secure the most meritorious of all the debts by him owing.

Respondent denies that either Dr. McClellan or Mrs. Carswell had, in receiving this deed, any fraudulent intent whatever.

That Mrs. Carswell was a gentlewoman of more than 70 years of age, and Dr. McClellan a phycisian whose professional business confined him to Philadelphia, his place of residence. It is admitted that they were negligent of their duties, owing to their unbounded confidence in Dr. Ely; but it is averred that this is all that can be alleged against them.

As to all that is stated in the bill of complaint respecting the consent, acquiescence and understanding of Ezra Styles Ely to the illegal, irregular and void proceedings by which the mortgage upon the Gentry farm, (held by Gallaher and under which complainant claims) was supposed to be foreclosed, the respondent says that the same is essentially of the nature of flummery and rubbish, seeing that the title to real estate in Missouri does not vest and is not divested by, any such understandings or pretences, and that no one by "recognizing as valid" that which has no validity, can confer upon it, as against any *bona fide* mesne incumbrancer for value, any greater legal force and effect than it would enjoy independent of such recognition.

Respondent states and charges, that the six shares of Jefferson Medical College stock, mentioned as having been by Ely paid to Gallaher on account of the debt for which the mortgage to Gallaher was given, were at the time they were so given and transferred to the said Gallaher, the property of the said Mary Ann Ely Carswell, since married to respondent, and that the purpose of Ely in making this payment could only have been, and actually was, to redeem the land from the said mortgage for the benefit of the said Mary Ann Ely Carswell; and that to impute to him any other and opposite intentions, is to make him, the said Ely, a knave of unimaginable proportions, which this Court will not do gratuitously.

Respondent denies that Gallaher was in the fall of the year 1846 entitled to a balance of $955 91 on this mortgage. He says that said Gallaher had by divers executions and sales thereunder against said Ely realised and appropriated to the payment of said mortgage debt large sums of money, which either extinguished the mortgage debt (which respondent believes and charges to be the case) or else left the merest trifle unpaid.

That the confession of judgment in favor of Gallaher was, so far as the mortgaged premises were concerned, a mere nullity. That the costs and charges attendant on this proceeding are in no wise chargeable on the mortgaged premises, and that they are not chargeable with the compounding of the principal and interest effected by that arrangement. That by executions issued on this confessed judgment against the lands of Ely and sales thereunder, large sums of money were realised, Gallaher being in many cases the purchaser. That, whether he obtained the Sheriff's deeds or not for these lands, he is chargeable with the price bid, and that the history of this very case shows that he can yet come in and obtain such deeds. That there is no reconveyance by Gallaher to Ely of these lands on adjusting the balance in 1846, although that balance can in no way be reached except by leaving all these monies made on executions out of the account. And that no such reconveyance could be made by Gallaher for the purpose of cancelling a credit on the mortgage debt to the prejudice of the mesne incumbrancer who was the wife of respondent. That this mesne incumbrancer (Mary Ann Ely Carswell, now Mrs. Miles,) was not merely such, but, as above shown, the redemptioner of the land, the moatgage debt being paid with her property at least as to eight-ninths of it. That no suggestion that Gallaher up to this time has obtained no deed from the Sheriff, and therefore does not need to relinquish the interest to him struck off and by him purchased in said lands, is worth a moment's attention, because this very case shows (p. 77 of printed record) that he may at any time hereafter obtain such a deed, seeing that Messrs. Samuel T. Glover and Carty Wells did, as therein shown, in 1848, long after the expiration of the Sheriff's term of office, procure an amendment to a return of a writ of execution that expired five years before, setting forth that said Samuel T. Glover and Carty Wells had purchased a piece of land in the town of Palmyra, containing twelve 1-10 acres (worth at that time $6,000) for the sum of $12 50, though there was no hint in the return of 1843 of any such purchase, or of the money supposed to have been bid therefor; and the Circuit Court of Marion County ,Missouri, allowed the Ex-Sheriff upon these data to make for the said land to said

Glover and Wells a deed which the Supreme Court of Missouri (19 Mo. R. p. 408) pronounced to be unimpeachable.

Respondent further answers and charges that in conducting the redemption from Gallaher of the land mortgaged, Patterson was the mere agent of the said Ezra Styles Ely; that he knew all the facts above detailed, particularly of the payment of the greater part of the mortgage debt with the property of Mary Ann Ely Carswell, and the realising by Gallaher of the sums made on execution against Ely, and also of the incumbrance of January 5, 1838. That Patterson, who was son-in-law of Ely, was a mere volunteer and could not obtain any other interest in said property than such as Ely himself could obtain by the same means, and that any money paid by Patterson on that occasion was furnished by Ely.

Respondent further answers, that if Patterson united with Ely and confederated with him to practice a fraud upon the ward of the latter, (as must be the case if the theory of complainant's bill be correct) then said fraud was visible, notorious, gross and palpable on the face of the paper placed on record in relation to this "Gentry Farm" before the complainant acquired any title thereto; and neither he, nor any one else claiming under him, can come into a court of equity and ask its aid to polish and refine such an iniquity into a perfect title. Respondent submits that a bill to give the complainant peace or dissipate a cloud on his title, is not allowed in favor of one who thus speculates; and that the subsequent purchase by the complainant's vendor of all the interest of Ely in this land is only so far material as it shows the consciousness of the said purchaser of the invalidity of the title by which he held the "Gentry Farm," and of his anxiety to bind together a number of rotten twigs into a bunch possessing some semblance of strength which might deter the rightful owner from testing their real character. And respondent submits that the very tenor of the deed from Gallaher to Patterson, dated Oct. 31, 1846, recites and declares the full payment of the mortgage debt, whence it follows, the first incumbrance being paid and Gallaher's only title to the land being under a sale admitted to be void, that Carswell and McClellan, purchasers of the said land under a valid judgment

and execution, were clothed with a perfect and unincumbered title thereto for the benefit of Mary Ann Ely Carswell, for whom respondent is trustee; and of all these things Patterson and all persons claiming under him had due and full notice.

Respondent denies the claim of Caldwell for improvements, and submits that the structure of his bill is not such as in any event to permit him to recover or retain for such, even if he was a *bona fide* purchaser for value without notice of any countervailing title. But that in the actual case complainant exhibits himself to the court as a sturdy and clamorous mendicant for protection to a hardy speculation made with full knowledge of the risks attending it. That complainant shows himself to have taken possession of the land, the title to which he patched up after his purchase from Tatlow, until which cobbling he shows that he had not sufficient confidence in Tatlow's warranty to make any improvements on the land; and the improvements made by him were simply such as were necessary for the raising of crops, in the pernancy of the profits of which he and his grantor had been for ten years, in opposition to the rights of the true owners.

Respondent answers and charges that the full payment of the mortgage debt secured to Gallaher by Ely by the deed of November 1837, was expressly, pointedly and emphatically put in issue and tried between complainant and respondent in the suit in ejectment wherein judgment was rendered for respondent. That the jury in said suit empanelled decided the said issue in favor of respondent and found that the whole of said mortgage debt was paid, satisfied and extinguished by the said Ezra Styles Ely and no other person, and judgment was given against complainant on said verdict, wherefore respondent submits that complainant is estopped to say that the said Ezra Styles Ely did not pay the said mortgage debt.

Respondent says that in January 1850, when the said deed was made to Tatlow by Ely, the latter was much shaken in strength of mind and body and subject to the influences of those about him; and that the said deed was obtained by the undue influence of Patterson, his son-in-law, in combination with complainant and Tatlow for the purpose of accomplishing the present fraud on the

rights of the respondent's wife, and that Tatlow, Patterson and complainant in procuring said deed knowingly and wickedly combined and confederated to defeat the title and defraud the rights of Mary Ann Ely Casswell, then the wife of respondent, and the children of Clement Lee Brady, and for that purpose abused the confidence and imposed on the imbecility of the old and infirm Ezra Styles Ely, and that this very deed and the manner of obtaining it ought to bar the doors of equity against the complainant.

A general denial of all combination and fraud on the part of respondent and Mary Ann Ely Carswell with Mrs. Carswell or Dr. McClellan follows, and the answer is duly verified by affirmation.

There were several depositions taken on both sides. The contents of those of the part of the complainant were as follows:

John Nichols (p. 101 of R.) speaks of the quality of the land and its fluctuations in value since 1846.

Wm. H. Feaster, (p. 102) Cacey Forman (p. 102 to 104) and D. G. Davenport (p. 104) speak of the same thing and of the improvements put on the land by Caldwell.

Allen Gallaher (p. 105 and seq.) was the justice who took the acknowledgment of the deed dated January 5, 1838. He states that on or about the 6th of January, 1838, he went to Dr. Ely's house, at his request, and took his acknowledgment of a number of deeds; they purported to be deeds of conveyance to divers persons not recollected. "One of these papers, Dr. Ely said, was designed to be a mortgage to Mrs. Carswell and Dr. McClellan; but on that paper there was nothing written except *an acknowledgment or certificate of acknowledgment, and above the certificate his name and his wife's name, and a date on the left hand side of the sheet opposite to their signatures.* He said he wanted me to take his and his wife's acknowledgment and sign the certificate, stating that he intended to fill it up with a mortgage to Mrs. Carswell and Dr. McClellan to secure them *in their liability as his securities on his guardian's bond, as guardian of Mary Ann Ely Carswell*; that he had made a deed for that purpose, but the lawyers had said it would not answer the purpose."

"That morning he took the acknowledgment of Dr. Ely to 27 'different papers, some of them written out as deeds and others in 'about the same condition as the one I have spoken of. In regard 'to those that were blank, he stated with reference to each how he 'intended to fill them out. Dr. Ely wrote out the certificate and I 'signed them. His wife was present. I expressed some surprise 'at that manner of doing business, and manifested a reluctance to 'sign the certificates in the blanks. His wife said that they were 'doing this to protect themselves *against Rodgers*; that Rodgers 'had brought suit, and they were apprehensive that he would sacri-'fice their property. This was said in the presence and hearing of Dr. Ely, he being on one side of the table and his wife on the other side. When she said this he raised his head and looked at me. He did not say anything, but his manner looked forbidding like." To a question by Caldwell he said that nothing was said about any creditors except Rodgers. The witness was then asked: "Have you ever since that time seen the certificate to which you referred, signed by you on the blank, that Dr. Ely stated that he intended to fill with a deed to D. McClellan and Mrs. Carswell?" and replied, "I have seen a certificate with my signature to it of that date (Jan. 6, 1838) attached to a deed mortgaging a large amount of property to Mrs. Carswell and Dr. McClellan to secure them as his, Ely's sureties, as guardian of Mary Ann Ely Carswell. I saw it at St. Louis, in October, 1856, during the sitting of the United States Court. It was read during the trial of a case of Miles, the defendant in this suit, vs. Caldwell, the complainant, by Mr. Glover, and was submitted to me while I was testifying in said cause." To the question, "state whether the mortgage of January 6, 1838, refered to by you above, is the same to which your certificate of January 6, 1838, is appended?" he replied, "I say that it was; that is, that the signature to the certificate was genuine and was dated of the same date. I feel persuaded that it was a certificate signed by me at that date, and the instrument to which it was appended was a mortgage of January 5, 1838." The witness then goes on to show in the most unequivocal manner that he refers to the deed of trust or mortgage which appears at p. 59 and seq. of the

printed record. He estimated the value of the property included in that deed to be $55,000, if the debts were all collected and the titles all good and clear. Nearly one fourth in value of the property was perishable and would be consumed within five years. That the corn, hay &c., were fed away to the stock during the year 1838; that in 1841 all the property, except two negroes, had passed out of his hands; that William Muldrow shortly afterwards got these; that Ely rented part of the mortgaged lands, &c.

On Cross-Examination he said that neither Dr. McClellan nor Mrs. Carswell was present at this interview. That the debt of Ely to Rodgers was about $3,000. That he did not know the number of acres of land in the mortgage; that he thought it, except the town lots, worth $5 per acre; that less than one-fourth of the land was in cultivation; that he did not remember the number of cattle and horses in the mortgage, nor their value, except that it was lower in 1838 than in 1858. That the debt included in the mortgage from the college, amounting to $13,000, was lost, the college being insolvent, and instead of Muldrow owing a debt to Ely it turned out that Ely was indebted to Muldrow. At the date of the deed Dr. McClellan was not in Missouri; Mrs. Carswell was.

William Lair (p. 113) speaks of the value of the Gentry Farm in 1846.

James Patterson (p. 113) testified that he became acquainted with Dr. Ely in 1840, and knew Mrs. Carswell and Dr. McClellan from 1843 to their death. That the paper shown him, exhibit A, is a copy of the original which was signed by Mrs. Carswell and Dr. McClellan. They sent it to Mr. Tuttle to close up the business between them and Dr. Ely. That in May, 1843, they told him that Dr. Ely had authority from them to dispose of the property described in the mortgage, and that they had full confidence in his doing right; that they permitted him to use the proceeds to pay his debts. Mrs. Carswell and Dr. McClellan were worth $50,000 from 1840 to 1852. The authority from them to Dr. Ely was given by power of attorney, (p.115) which witness saw.

Witness then in reply to a question said, that he did not recollect hearing either Mrs. Carswell or Dr. McClellan say anything as to the purpose with which the mortgage was made by Ely. Whereupon, against the objection of respondent, complainant handed to him a copy of a former deposition given by him in 1852, from which he reads and the commissioner inserts a passage, and the witness proceeds to say that he now recollects a conversation with Dr. McClellan in 1843. He does not give the nature of that conversation. Witness knows of a large amount of personal property included in the mortgage being sold by Dr. Ely to various persons; (p. 116) also real estate. Witness said that Dr. Ely did not furnish any of the money he paid to Gallaher; that he paid Gallaher the whole of the purchase money—could not say how much—in gold. Witness sold to Tatlow. That Ely had Gallaher's obligation to make to him, or his next friend, a deed for the land if the purchase money was paid by a given day. Ely wrote to Patterson just before the time for redemption expired, that he could not raise the money; that he, Patterson, might do it and get the deed. That Dr. Ely at the time of the deposition (in or after 1858) was in Philadelphia, diseased in mind and body, disabled by paralysis from attending to business. That Dr. Ely sold some of the personal property in the mortgage mentioned to witness, and that he settled for part of it with Dr. McClellan.

On Cross-Examination he said he saw Dr. McClellan and Mrs. Carswell for the first time in the spring of 1843. That he conversed with Mrs. Carswell on the subject mentioned in the answer to third interrogatory in the house of Samuel Lamb in Philadelphia in presence of Mrs. Mary Elliott, grand daughter of Mrs. Carswell, since dead, several of Mrs. Lamb's daughters, and he believes Mrs. Lamb. Don't remember what gave rise to this conversation, or who introduced it. Had many other conversations with Mrs. Carswell or Dr. McClellan, but as to these others cannot remember who, if any, was present, and never had any conversation with both together. It was "*on these occasions,*" in Philadelphia, that they told him Dr. Ely was permitted by them to use the mortgaged property as he pleased. Don't remember

any one being present except Mrs. Elliott [it will be remembered that *she* is dead] and *several* of Mrs. Lamb's daughters. Witness is son-in-law of Dr. Ely, and his wife is sister-in-law of Dr. McClellan. Both Mrs. Carswell and Dr. McClellan owned land in Marion and Ralls counties, Missouri, from 1836 to their respective deaths. Witness in 1843 got possession of about 400 acres of land, which is included in the mortgage from Ely to Carswell and McClellan, and conveyed to his wife part of those lands. (Complainant objected to this testimony, p. 119.)

Exhibit (A) is a letter from Carswell and McClellan to D. C. Tuttle, dated Philadelphia, October 9, 1843, requesting him to take out execution on all the property mortgaged to them by Dr. Ely, on which mortgage he had confessed judgment, and sell so much as might be necessary to pay the amount of the judgment, for cash. A post-script by Samuel McClellan alone directs Tuttle to buy in for S. McClellan, in trust for the creditors, any property that would otherwise be sacrificed.

Then follows a bill of sale whereby on the 1st of February, 1842, James H. Patterson (the same who is named above) appears to have purchased from Ely personal property of the value of $4894, respecting which, Ely says in his receipt: "I have this "first day of February, 1842, received of James H. Patterson, in "full, four thousand eight hundred and ninety-four dollars. "Witness my hand and seal.

EZRA STYLES ELY, [Seal]
(p. 122) for himself, and
EZRA STYLES ELY,
Attorney in fact for Margaret Carswell and Samuel McClellan."

Exhibit C is in the following words:

"Received April 15, 1842, of Abram Barnes, by his Attorney James H. Patterson, six hundred dollars, in part payment of his purchase money, due for the mill and farm sold him in Ralls county.

MARGARET CARSWELL and
(p. 123) SAMUEL McCLELLAN,
by their attorney E. S. Ely."

Then comes the deposition of Wm. Forman. He says he knew Dr. Ely and his wife and Mrs. Carswell who lived with them. Frequently called at Dr. Ely's house as justice of the peace to take acknowledgments of deeds. On *one* occasion took the acknowledgment of 56 deeds. Mrs. Carswell and Mrs. Ely were always present. In 1839 or 1840, Dr. Ely said to him in presence of Mrs. Carswell that he made a mortgage to Mrs. Carswell and Dr. McClellan to secure them as his sureties as guardians of his ward, and that he had given much more property in this mortgage than was necessary, in order to prevent it being sold and sacrificed by other creditors; but that he did not intend to defraud these last, as Carswell and McClellan had given him a power of attorney to sell any of his property to pay his debts, and that he intended so to sell and pay (p. 123.) The cross-examination revealed nothing but that Mrs. Carswell frequently expressed her apprehensions that Dr. Ely was conducting his business very loosely; that the witness considered his own memory perfect; and that he had a daughter married to a son of Moses Gentry [whose position in respect to Miles, is precisiely that of Caldwell—a judgment in ejectment having been rendered against him in 1856, and the final action of the court in respect of the enjoining of proceedings thereon, being made to depend on the determination of this suit.]

Then comes the depositions of Mary Ann Patterson, who (p. 125) testifies that in 1838 she was "about 11 years old," but has a distinct recollection of sundry conversations held between Dr. Ely and Mrs. Carswell. Frequently heard Mrs. Carswell speak of the mortgage from Dr. Ely to herself and Dr. McClellan. "Since that period [1838] I think Mrs. Carswell was in Missouri three times, between the years of 1836 and 1840." Had conversations in 1842 and 1843 with Dr. McClellan. Both Mrs. Carswell and Dr. McClellan "always expressed entire confidence in Dr. Ely," and "seemed to think he would do what was right towards Mary Ann Carswell and his other creditors mentioned in the mortgage." (p. 125.) They frequently spoke of having given Dr. Ely power of attorney to dispose of the property mortgaged as he saw fit. They knew he was doing this. Some-

thing was said about preventing a sacrifice of property, but witness cannot remember what. She proves a letter produced to be in Dr. McClellan's handwriting.

On cross-examination it appears that the lady is a daughter of Dr. Ely, that she resided with her father at West Ely, Marion county, Mo., in 1837-38. That Dr. McClellan then resided in Philadelphia. That he was on a visit to Missouri in the summer of 1836-37, with his wife, and never was there except on that occasion. That she saw him afterwards in Philadelphia, in the winter of 1837-38, again in the winter of 1839-40, and again in the winter of 1842-43.

Next comes a letter from Dr. McClellan, dated Philadelphia, August 2, 1843, addressed to both James H. Patterson and wife, commencing: "Dear James and Dolly," and going on to speak of Dr. Ely's second marriage, in terms of some chagrin, but in no degree pertinent to the present inquiry. The writer proceeds to say (p. 126,) that Dr. Ely goes out to Missouri, "with the intention to foreclose the mortgage at once, and settle up the business out there." "This will be the only safe thing that can be done in the present state of things, and to revoke the power of attorney would not mend the matter, as unless the property was sold out and bought in, it would, I conceive, be just as liable as it now is—I hope he will attend to it and not change his mind,". &c. Then follow some complaints of his want of fixedness of purpose and the bad consequences of such a disposition of mind. Then comes (on p. 127) some mention of property standing in Mrs. Mary Ely's name, (who she is does not appear, but it is presumed it was his first wife,) and the propriety of dividing this among her children. The rest is simply gossip, unintellible to the uninitiated.

William Muldrow's deposition follows on pages 128, 129 & 130. He resided at the time in Sacramento city, California. He had known Mrs. Carswell and Drs. McClellan and Ely since 1836. Knew them first in Philadelphia; afterwards met Ely in Missouri; —knew of a conveyance of property by Ely to Carswell and McClellan, to secure a debt to "Mary Ann *McClellan*," grand daughter of Mrs. Carswell and ward of Ely. Had heard Ely say

this property was conveyed in trust to secure Miss *Carswell* and his other creditors, who would indulge him more than one year. His avowed object was to get time for the payment of his just debts, and to prevent his creditors from sacrificing his property. Never heard Carswell and McClellan say anything of the mortgage or its objects. On cross-examination he said he had in a suit against Ely attacked the validity of this deed to Carswell and McClellan. Before the suit was terminated the matter was compromised, and Ely settled with him satisfactorily.

Then appears (p. 130) a power of attorney dated March 26, 1839, executed by Margaret Carswell, constituting the Rev. Ezra Styles Ely her true and lawful attorney, conferring power on Dr. Ely, 1st., to sue for, demand, recover and receive any moneys and debts owing to her; 2nd., to lease any real estate to her belonging in Missouri; 3d, to sell any personal estate to her belonging; 4th, to remit or release from mortgage any property and all property mortgaged to me by my son-in-law, Dr. Ezra Styles Ely, of said Marion Co., to secure the payment of certain debts," wherever situated, "and to bargain, sell, convey & deed to ra Styles Ely, or to Dr. Samuel McClellan of the c delphia, or their lawful heirs, each and every porti ... to which I have by covenant secured to them severally a preemption right, as soon as they respectively shall, or either of them, have fulfilled the covenants on which said preemption has been by me secured to them, or either of them." The rest is merely a formal covenant to ratify and confirm all acts by her attorney done by virtue of this power. This power of attorney was recorded in Marion county, Mo., on Oct. 15, 1842.

Then (at p. 132) comes a power of attorney, whereby Samuel McClellan and Margaret C. McClellan, his wife, on the 15th October, 1842, constitute Rev'd. Ezra Styles Ely, their attorney, with power, 1st, to sue for, demand, recover and receive all moneys and debts to them owing; 2nd, "to sell, barter, exchange or dispose of any real estate of which we are now seized and possessed, in fee simple, or for any less estate to any person or persons, for any price," &c., and "to purchase any real estate on our account," in the most general manner possible; 3d, to pay

thing was said about preventing a sacrifice of property, but witness cannot remember what. She proves a letter produced to be in Dr. McClellan's handwriting.

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this property was conveyed in trust to secure Miss *Carswell* and his other creditors, who would indulge him more than one year. His avowed object was to get time for the payment of his just debts, and to prevent his creditors from sacrificing his property. Never heard Carswell and McClellan say anything of the mortgage or its objects. On cross-examination he said he had in a suit against Ely attacked the validity of this deed to Carswell and McClellan. Before the suit was terminated the matter was compromised, and Ely settled with him satisfactorily.

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all debts by them owing to any body; 4th, to enter upon, sue for and recover possession of any land to them belonging, and to bring any suits, whatever, in their name, in the most unlimited manner; 5th, to defend all suits brought against them; "and whereas, the said Rev'd Ezra Styles Ely, D. D., has heretofore, as our attorney, exercised the powers aforesaid, or some of them, and has, as our attorney, executed and acknowledged divers contracts, writings, deeds and instruments in our behalf, in and about the premises, and other matters and things, now we do hereby ratify and confirm all the doings of the said Rev'd. Ezra Styles Ely, D. D., as our attorney, in all matters and things by him transacted, performed, done and executed, at any time before the execution of these presents, to all intents and purposes whatsoever."

These were all the depositions and their exhibits read by the complainant. The exhibits of the complainant's bill were:

1st. The deed from Rhodes Gentry, dated 3d of September, 1835, conveying to Ezra Styles Ely the Gentry farm containing 447 acres, for the price of $3,280.

2nd. Mortgage from Ely to Gallaher, dated 18th of November, 1837, to secure $2,866 27 and interest at eight per cent., for which a note was given. (p. 30.)

3d. Proceedings to obtain judgment on the note, resulting in a general judgment against Ely, and proceedings to satisfy the same (p. 33—44.)

4th. Deed from the Sheriff to Gallaher (mortgagee) conveying all Dr. Ely's interest in the tract mortgaged, which was saleable under the judgment and execution (44—5.)

5th. The next exhibit was dated Nov. 1, 1843, and was a receipt for $3000 worth, being six shares of Jefferson Medical College stock, to be credited on the execution in the case of Gallaher vs. Ely (p. 46,) with a contract, that if Ely should pay to Gallaher in three years the principal interest and costs of the mortgage debt, he, Gallaher, would re-convey to him, Ely, the said stock, and also all his right and title, in law, to the Gentry farm, described in the mortgage.

6th. On the 31st of October, 1846, James Gallaher and wife, by deed of quit claim, reciting the aforesaid judgment, and

declaring that it had been fully paid and satisfied by the six shares of Medical College stock and $955 91 in money, did at the written request of the said Ezra Styles Ely, convey the said Gentry farm to James H. Patterson. (p. 47.)

7th. On the 5th November, 1846, Patterson, in consideration of the sum of *two hundred dollars*, bargained and sold the said farm to Thomas H. Tatlow. This conveyance contains covenant for title. The *habendum* clause is as follows: "To have and to hold unto the said T. H. Tatlow, his heirs or assigns forever—to have and to hold the title which the said Patterson obtained from James Gallaher." (p. 48.)

8th. On the 22nd September, 1849, Tatlow and wife for $1,750 conveyed with covenants for title to Wm. D. Caldwell two hundred acres, (viz., the S. E. 16, T. 57 N., R. 6 W. & E½ of S. W. qr. of sec. 16, T. 57 N., 6 W.—160 ⋈ 80=240, except 40 acres taken, &c., which reduces this parcel to 200 acres.) "And also eighty acres, part of the north half of section 21, bounded," &c. This tract of eighty acres is the land in controversy. (p. 49-50.)

9th. On the 1st of January, 1850, Ezra Styles Ely, D. D., of the city of Philadelphia, by deed of quit claim, for $200, releases to Thos. H. Tatlow the Gentry Farm, of which these eighty acres are a part. (p. 51.)

10th. On the 22d of November, 1837, Ezra Styles Ely made a deed whereby he conveyed to Margaret Carswell and Samuel McClellan a great number of tracts of land, ~~interest~~ trust for his creditors. This deed will be found at p. 52 and fol., to which reference is made. Nothing is claimed by either party under this deed, but it was offered by complainant, and admitted by the court against the objection of respondent, as showing the *animus* which inspired the subsequent deed of January 5, 1838.

11th. On the 5th of January, 1838, Ezra Styles Ely, D. D., reciting that he had been advised by counsel learned in the law, that the trusts declared in the deed of 22d November, 1837, were null and void, and that he was indebted to his ward Mary Ann Ely Carswell in the sum of $30,000 and interest for several years, which debt will be greatly increased before the period of

her majority, and to his wards, the children of Clement Lee Brady, in not less than $4000, and that the subscriber regarded these debts as of a peculiar character and preeminent claim, did convey to Margaret Carswell and Samuel McClellan certain property, including the Gentry farm. In this deed (to be found at p. 59 & seq. of the record) are included several negroes, who appear to be slaves only for a term of years; much personal propterty, cattle, household furniture and farm tools, and debts alleged to be due to Ezra Styles Ely from sundry persons, viz: From Marion College $15,000; from William Muldrow $3000; from Dunahower $500; from Hamton $500; from Samuel Carswell Ely $500; from Watson Hendricks $1000; from Smith $500; from Downing $500; from Crigmire, Crumley & Meley $1000 —(the whole amount being $22,500.) This conveyance was declared to be in trust to secure the debts recited, to his wards, and stipulated that if within five years Ely should pay said debts, in full, the deed would be void. This deed was acknowledged on the 6th of January, 1838, and recorded on the 8th January, 1838, *not* on the 8th of January, 1856, as by clerical error in the record (p. 54) would appear. The admission of the true time of the record is made by the appellee in this cause, and, moreover, is correctly stated in the bill of complaint.

12th. On the 12th of August, 1843, a petition was filed in the office of the clerk of the Marion Circuit Court to foreclose this mortgage, (p. 63,) and at the same time was filed an appearance and confession of judgment by Ezra Styles Ely, (p. 68.) Judgment was rendered accordingly (p. 69, & fol.) Execution was issued on this judgment, by virtue of which the Gentry farm was sold to Carswell and McClellan. (p. 63.)

13th. On the 17th of November, 1843, the Sheriff of Marion county executed a deed to Margaret Carswell and Samuel McClellan for the Gentry farm and several other tracts of land. (p. 242-3 of the record.)

14th. In obedience to a decree of the Philadelphia Court of Common Pleas, Carswell and McClellan released to Thomas J. Miles all the interest they acquired by this last deed. (p. 87 & fol.)

15th. In 1855 Thomas J. Miles commenced in the United

States Circuit Court for Missouri an action of ejectment against the complainant to recover the above mentioned tract of eighty acres of land, and recovered judgment for the land, $540 damages, and $96 dollars per annum or $8 per month untill possession should be given. (p. 160, & fol.)

This was the whole case of the complainant.

The answer of the respondent has been already given. The exhibits of his answer were as follows:

1st. The will of Samuel Carswell, dated September 1821. (p. 90, & fol.)

2d. The will of Samuel Kinsey Carswell, (father of Mrs. Miles,) dated June 14, 1829. (p. 94, & fol.)

3d. The third exhibit was the deed of January 5, 1838, from E. S. Ely to Carswell and McClellan. This has already been mentioned as one of the complainant's exhibits. It is found on p. 59, and following, of the record.

4th. The proceedings in the Orphans' Court of Philadelphia. These are to be found at p. 169 and fol. of the record.

5fh. The proceedings to foreclose the mortgage deed of January 5, 1838, are to be found at p. 63 & fol. of the record.

6th. The Sheriff's deed to Carswell and McClellan for the "Gentry farm" and other land, will be found at p. 242 & fol. of the record.

7th. The proceedings of the Court of Common Pleas of Philadelphia, in the case of Sharswood & Raybold vs. Carswell and McClellan, are to be found at p. 198 & fol.

8th. The deed made by Carswell and McClellan to Miles, in pursuance of the decree of the Court of Common Pleas, is to be found at p. 78 & fol.

The depositions on the part of respondent were the following, viz:

Deposition of J. J. Robinson, [p. 134 & fol.] This witness was the son of Mrs. Margaret Carswell by her first marriage. Has no interest in this suit. Mrs. Carswell died in 1851. Witness was 70 years old in 1859. Mrs. Carswell had bought lands in Missouri in 1835-36. She owned about 3000 acres there, in

Marion and Ralls counties, at the time of her death. She held a mortgage in Ralls county, to secure $10,000, and one in Marion, to secure $3,220. Mrs. Carswell went to Missouri in 1836, returned to Philadelphia in 1839, and never re-visited Missouri. Dr. Ely married Mrs. Carswell's eldest daughter by her second marriage. Dr. Samuel McClellan married Dr. Ely's eldest daughter. Mrs. Carswell had unlimited confidence in Dr. Ely. Dr. McClellan was the confidential friend of Dr. Ely, and they were much attached. Dr. Ely's character in 1831-5-6 was as high as that of any man in his profession. Mrs. Carswell gave Dr. Ely a power of attorney when she left Missouri in 1839. It was recorded. She gave him no other power of attorney. She told this to the witness. "As a clergyman Dr. Ely stood in the first rank. In theology he was proficient," [p. 136,] " as a business man he relied on his own intelligence to assist him in drawing his own writings. He would not consult a lawyer as most other men would. He had a great deal of self-confidence. I don't think he was a practical business man. I would at no time have relied on his ability as a business man." [id. ibid.]

Witness knew James H. Patterson slightly. He married a daughter of Dr. Ely in 1840 or 1841.

Mrs. Carswell "would not speak of her affairs except to those she was interested in," (p. 137.) "She was not communicative on the subject," (id. ibid.) She was much attached to her granddaughter. (id. ibid.)

Dr. McClellan invested money in 1835-36 in 1777 acres of land in Marion and Shelby counties, Mo.

Dr. Ely's mind was entirely gone 1859.

The witness spoke of Wm. Muldrow as possessing great influence over Dr. Ely, and as being a man who had not the confidence of the people who knew him in Missouri.

Mr. Samuel Carswell, the grandfather of Mrs. Miles, at the time of his death was estimated to be worth $300,000.

On cross-examination he said, that in 1838 Dr. Ely had besides the property conveyed to Carswell and McClellan, a church in Fairmount, Pennsylvania. He had this property in the spring of 1839. Knew nothing else of his property.

RE-EXAMINED.—Had heard Mrs. Carswell speak of the deed of January 5, 1838. She certainly believed that her granddaughter's interests were secured by it, and she would never have consented to anything to impair those interests.

2. Mary Ann McGorman (p. 138) testified that she had lived with Mrs. Carswell and served her for many years. Went to live with her in 1830—remained with her until she went to the West, and again lived with her after her return. She was a pious, conscientious, good and benevolent woman; witness afterwards lived with Dr. McClellan. In 1829 Dr. Ely was a prominent Presbyterian clergyman, generally well known and influential. Mrs. Carswell placed great confidence in his character. "Dr. McClellan always bore a very good character as a gentleman of worth and honor," (p. 139.) Knew a young lady who afterwards became Mrs. Miles. Her name was Mary Ann Ely Carswell. She was brought up in old Mrs. Carswell's family. Her parents both died in her infancy. Mrs. Carswell superintended her education, and the relations between them were always kind.

On cross-examination she stated that she had been a seamstress in Mrs. Carswell's family.

On re-examination she said she had been fourteen or fifteen years in Dr. Ely's, Mrs. Carswell's and Dr. McClellan's families. Mrs. Miles was about three years old in 1829, 1830 or 1831, when witness first knew her. Says that the memorandum in the family bible shown her, "Mary Ann Ely Carswell, born May 10, 1828, at Germantown," is not like Mrs. Carswell's handwriting, and she don't know whose it was.

3. J. B. Southerland, (p. 140 and seq.) testified that he knew Dr. Ely as far back as 1812, and 1830-1 up to 1835-6. "He was as pious and upright a gentleman as I knew—in my opinion a gentleman of the strictest integrity. This was his universal character in the community, as much as any clergyman I knew—he was like most clergymen, credulous." "He might have been easily imposed upon by designing persons in the matter of western lands." (p. 140.)

Mrs. Carswell "was one of the most exemplary ladies I ever knew." Witness knew her well. "She was a lady of character,

religious and exemplary, and of undoubted integrity. She was one of the most spotless ladies I ever knew—she was of spotless reputation." (p. 140.)

Witness knew Dr. McClellan when he was professor in Jefferson Medical College. (Witness was a trustee.) He was "a man of integrity," "distinguished in his profession," and was as "amiable and upright a man as witness ever knew." Witness from his knowledge of his character feels confident he would never have allowed his name to be used in any improper transaction. (p. 140.)

(This witness had filled high political and social positions. He had been member of Congress—Judge of the Court of Common Pleas of Philadelphia—was a graduate of the University of Medicine in 1812—afterwards a lawyer—and speaker of the House of Representatives of Pennsylvania.)

On cross-examination he said that Dr. Ely was a good man of business as far as a minister can be; but not well qualified for entering lands. Witness thought that clergymen were fit for nothing beyond preaching.

On re-examination he said that Dr. Ely had become entirely imbecile since his return from Missouri.

4. John R. Vogdes testified (p. 141 and seq.) that he had known Dr. Ely since 1820. Knew him until he removed to Missouri, and since his return. Witness was one of the members of Jefferson Medical College since 1838. Dr. Ely had been a trustee since its organisation in 1826-7. "He was, you may say, the founder of the Jefferson Medical College Edifice." (p. 141.)

In 1843 there were 59 ~~slaves~~ shares of stock of Jefferson Medical College Edifice, the par value of which was $500 each. Prior to the month of November 1843, the certificates were thus held:

| | | |
|---|---|---|
| Estate of Clement Lee Brady, | 2 | ~~slaves~~ shares. |
| " Mr. Dreamer, | 2 | " |
| " Dr. Jacob Green, | 1 | " |
| " Mrs. Flickerer, | 1 | " |
| " Horn & Kreass, | 1 | " |
| " Mary Ann Ely, now Mrs. Patterson, daughter of Ely, | 2 | " |

The balance Dr. Ely held in trust for his ward, Miss Mary Ann Ely Carswell, the wife of Mr. Miles, 50 ~~slaves~~ shares.

After Sharswood and Reybold became trustees for Mrs. Miles, Dr. Ely transferred to them in 1844-5 forty-four ~~slaves~~ shares of this stock. The remaining six ~~slaves~~ shares were transferred to Rev. Doctor Gallaher of Missouri. This transfer was made in 1843. The interest on all this stock amounted to $1,770 per annum, [just six per cent. on the par value.] This interest witness paid either to Dr. Ely or his agent on the 25th of November, 1843.

Prior to his going to Missouri Dr. Ely's character was good. He was regarded as a man of wealth, and enjoyed the confidence of the community.

He was visionary—not a good business man—disposed to place confidence in almost every one—easily imposed on—more so than ordinary men. He was obstinate and opinionated. (p. 142.)

Witness knew Dr. Samuel McClellan from 1830 to his death. "He was an eminent physician—a man of unimpeachable character, of high integrity, and stood high in the communtity." (id. ibid.) To the question, whether Dr. McClellan was a man who would have allowed the use of his name in any legal transaction for an unworthy or improper purpose, witness replied, "He was not and would not—I say this strongly. He was a man who would not countenance any wrong." Witness also knew Mrs. Carswell's character. It was good and exemplary—as high as that of any lady then living. She would not have permitted the use of her name for any improper purpose.

Mr. Samuel Carswell was an eminent merchant, and left, it was supposed, from $300,000 to 400,000.

On cross-examination he said his knowledge of this was derived from rumor. He knew it as he knew of the wealth of Stephen Girard or George Harrison. Dr. Ely was not a good business man. (p. 143.)

5. George Sharswood had been one of the trustees of Mrs. Miles from 1843 to 1856. He spoke of the proceedings against Ely. Dr. Ely applied for the benefit of the Insolvent Law, which

witness opposed because he had been guilty of breach of trust in respect of Mrs. Mile's estate. The court however discharged him because the breach had occurred prior to the date of the law. Witness also spoke of the proceedings against Carswell and McClellan. For the proceedings themselves, see p. 198 and following.

This witness was not cross-examined.

6. Robert Steel, a Presbyterian clergyman, testified (p. 144) that he was intimately acquainted with Dr. Ely, of whose character he spoke highly. In 1843 he had a conversation with Dr. Ely, respecting the property of his ward Miss Mary Ann Ely Carswell, now Mrs. Miles. Witness was curious to know how her property was situated. Ely said he had been somewhat embarrassed, but had secured her property, which was about $30,000 originally and interest for several years. He said it was secured by deed of trust or mortgage so that she could not suffer. Witness spoke in very high terms of both Mrs. Carswell and Dr. McClellan.

On cross-examination he said, that his motive for asking Dr. Ely respecting the estate of his ward, was his "interest in the family and in this lady who was an orphan." (p. 145.)

7th. J. H. Philips testified (p. 145 & fol.,) that he was a member of the Philadelphia Bar. He had known Dr. Ely over fifteen years personally; by reputation, all his life. His character and reputation *before he went west* was very high. He was pastor of third Presbyterian Church, and beloved by the congregation—a man of influence in it and the community. He was a man often appointed trustee and executor—confidence was placed in him. Had not known him since his return. Samuel Carswell was reputed to have been of high social position and wealth. Witness knew Dr. Samuel McClellan. He was of good conduct and repute—of entire respectability—never heard any imputation to the contrary. Had heard of Wm. Muldrow, and from what he had heard, should say, he was a cheat and a swindler.

Cross-examination declined.

8th. Margaretta Lamb, (p. 146,) testified that she was the daughter of Margaret Carswell and widow of Lemmon (Q. Lem-

nel?) Lamb. She said her mother was not communicative about business matters. When she wanted advice she consulted her son, Capt. J. J. Robinson.

The first time her mother ever saw Mr. Patterson was at witness' house. On that occasion nothing was said about a deed of trust or mortgage. On his next visit Captain Robinson's daughter, Mrs. Eliott, Mrs. Carswell and two or three of Mrs. Lamb's daughters were present. The conversation was desultory. Thinks nothing was said about deed of trust or mortgage. "If there had been, I would certainly have been likely to have noticed it," [p. 147.] No private conversation—a mere visit of courtesy. Probably two or three visits of mere courtesy after this. This was the only evening he was at the house of witness. Had no recollection of any allusion to business on these occasions. This witness spoke warmly and affectionately of her mother, and highly of Dr. McClellan as a man and physician, [p. 147.] Witness' mother frequently spoke to her of her lands in Missouri, of which she had a large quantity. To the question whether she ever spoke in witness' hearing of a power of attorney, given to Dr. Ely in relation to any deed of trust or mortgage, she replied, "never, I heard nothing about it. I knew of her having given a power of attorney to Dr. Ely to execute her private business in Missouri." Also, that Dr. McClellan had much land in Missouri, and that Dr. Ely was his agent. Never heard Dr. McClellan speak of any power of attorney in relation to a deed of trust or mortgage. Knew Wm. Muldrow. Considers Dr. Ely the victim of this man, and that he was a villain—would not believe him on oath. Dr. Ely had considerable property in 1836, not included in the deed of Jan. 5, 1838.

On cross-examination she said that Patterson's visit occurred in May 1843—can fix it by circumstances, [p. 148.] Her mother spoke freely to her of her affairs, she being her only [surviving] daughter. She spoke to her of them more than to any other person, except Capt. Robinson.

Knew that Dr. Ely had a row of buildings on 6th street [Philadelphia, ] in 1838, not included in the mortgage of Jan.

5, 1838. Don't know whether it was incumbered or unincumbered.

On re-examination she said she did'nt think Mrs. Patterson was present at the evening visit. Never heard Mrs. Patterson in conversation with Mrs. Carswell make any allusion to a deed of trust or mortgage.

9th. William Nassau, [p. 149,] testified that he was almost 78 years old. Knew Dr. Ely from 1813 to the time of testifying. Was a member of his church. Had the fullest confidence in him, and expressed the highest opinion of his character and principles. Knew Muldrow—thinks he made Ely his victim. Would not believe Muldrow on oath, from his general character. Never heard any insinuation against Dr. Samuel McClellan. Regarded Mrs. Carswell as a lady of the highest character.

10th. John W. Greer, Chaplain United States Navy. Knew Dr. Ely's character prior to his going to Missouri. It was very high for piety, ability and integrity. He was a man of influence and wealth. Knew Dr. Samuel McClellan well by reputation, personally but slightly. His character for piety, integrity, personal and professional worth was very high. Knew Mrs. Carswell by reputation. Her character for truth, piety, integrity and conscientiousness was very high. Knows Wm. Muldrow's character. Would not believe him on oath.

11th. Samuel Miles, brother of respondent, testified [p. 150 & fol.] that he knew Muldrow and would not believe him on oath.

12th. Mrs. Mary Jane Robinson testified, that from conversations with Mrs. Carswell in 1843, she knew that she had no confidence in Mr. Patterson, and did not like to hear his name mentioned. [This lady is wife of Capt. J. J. Robinson and sister of respondent.] She testifies that Mrs. Mary Elliott, and Mrs. Pepper [formerly Miss Margaretta C. Lamb] are dead.

The respondent gave in evidence a record of the case of Louthan vs. Caldwell in the Marion Circuit Court, Missouri, upon a note for $750, dated Jan. 9, 1850, made by Wm. D. Caldwell to Thomas H. Tatlow, and assigned to plaintiff by Tatlow. The defendant William D. Caldwell answered under oath, that the consideration of this note was the conveyance by Tatlow to him of

the land in controversy, and other lands by deed of warranty. That as to the land in sec. 16, there is no defect of title, but that as to the residue of the note remaining unpaid [750—307,50= 442,50] it was the price agreed on for the eighty acre tract; and that Miles has recovered judgment against him for that tract, and the consideration for the note has wholly failed. This transcript is to be found at p. 152 & fol. of the record.

Lastly was given in evidence the record of the ejectment case in the case of Miles vs. Caldwell, proceedings on the judgment in which it was the object of this suit in equity to enjoin. [See p. 159 & seq. of printed record.] This suit was commenced on the 12th September, 1855. A plea of not guilty was filed at the October term 1855, and at the October term 1856 the cause was tried. The trial commenced on the 21st October, and occupied, besides that day, the 22d, 23d, 24th, 25th and 27th. The jury rendered a verdict on the 28th October, 1856, for the plaintiff. On the 30th October, '56, the defendant filed a motion for a new trial, assigning for reasons, 1st, that the Court had refused a proper instruction moved for by the defendant to be given to the jury; 2d, that the verdict of the jury is against the evidence in the cause, and in relation to the satisfaction of the mortgage to Gallaher, is without any evidence to support it, and the damages are enormous and wholly against evidence; 3d, the jury disregarded the evidence in finding that the deed to Carswell and McClellan, dated January 5th, 1838, was not fraudulent; 4th, the Court erred in not deciding said deed of January 5th, 1838, fraudulent and void on its face. Which motion the Court on mature consideration overruled on the 15th November, 1856. It was admitted at the hearing [see the agreement of the parties p. 29] that "at the trial of said ejectment suit the deed of mortgage of Ely to Carswell and McClellan, dated Jan. 5, 1838, was impeached for fraud, and upon the question then made before the jury, the Court gave the following instructions:" viz, [these instructions appear at p. 165 & fol.] At the instance of the plaintiff [now respondent] the Court instructed the jury, [1] "Although Dr. Ely, on making the deed dated January 5th, 1838, may have been quickened by the steps taken by some of his other

creditors, to whom he wished to prefer his ward, yet that circumstance alone does not render his deed void or voidable in law, provided he owed the debts which that deed was executed to secure, and the value of the property conveyed was not unnecessarily large to secure those debts, if the deed was presently after execution placed upon record in Marion county, or delivered to the grantees Carswell and McClellan."

[2] "The Jury is instructed, that the deed read in evidence from James Gallaher to James H. Patterson is no evidence of title in James H. Patterson and those claiming under him, if the mortgage debt from Ely to Gallaher was, before or at the time of said deed, paid and discharged by Ely, or with money furnished by Ely for that purpose."

[3] If the jury believe from the evidence that the money paid to James Gallaher by James H. Patterson, on the 31st October, 1846, was furnished for that purpose by Ezra Styles Ely, they will regard the mortgage from Ely to Gallaher as paid and satisfied."

[4] "If fhe jury find as indicated in the preceding instruction they will find for the plaintiff, unless they find from the evidence that the object of Ezra Styles Ely in making the deed of mortgage January 5, 1838, was to defraud his creditors."

[5] "Fraud is never to be presumed by a jury. The party assailing a deed on the ground of fraud must establish it by evidence to the satisfaction of the jury."

At the instance of William D. Caldwell, the defendant, the court gave the following instructions:

[1] "That if the jury find from the evidence in the cause that at the time of the execution of said deed to Carswell and McClellan of January 5, 1838, much more property was embraced therein than was necessary at its then reasonably estimated value to secure the debts mentioned therein, and at the same time the said Ely was indebted to other persons, and altogether was indebted more than he was able to pay: that such embracing of more property than was so reasonably required, may be considered by the jury with the other facts and circumstances of the case in de-

termining whether said deed was fraudulent as against creditors of and purchasers from said Ely."

[2] "That the conveyance of goods and chattels of a perishable nature or consumable in the using, by way of mortgage or other security for the payment of a debt, when by the terms of the conveyance such goods and chattels must of necessity be consumed or perish before the debt is to be paid, and the possession of such goods and chattels is suffered to remain with the grantor, such facts are evidence that such conveyance was made by and between the parties thereto with intent to hinder, delay and defraud the creditors of the grantor or any purchaser or purchasers from him for value."

[3] "That when a deed is made conveying property to secure an existing debt or debts, and by the terms of the conveyance much more time is given for the payment of the debt or debts than is usually necessary to collect such debt or debts by due course of law, that fact may be considered by the jury with the other facts and circumstances of the case in determining whether such deed is fraudulent as to creditors of and purchasers from such grantor for value."

[4] "That if the jury find from the evidence in the cause that at the time of the execution of said deed to Carswell and McClellan of January 5, 1838, by Ely, much more property was embraced therein than was necessary at its then reasonably estimated value to secure the debts therein mentioned, and at the same time the said Ely was indebted to other persons, and altogether was indebted more than he was able to pay; that such embracing of more property than was so reasonably required, may be considered by the jury with the other facts and circumstances of the case in determining whether such deed was fraudulent as against creditors of and purchasers from said Ely."

[5] "The jury are instructed that the deed made by said Ely to Carswell and McClellan, dated November 22, 1837, and recorded December 5, 1837, and read in evidence by the defendant, appears on its face to have been made with intent to hinder, delay and defraud creditors, and may be used by the jury as furnishing a clue to the motives which induced the making of the deed

of January 5, 1838, providing the making thereof was known to said Carswell and McClellan, and was accepted by them or consented to by them."

[6] "If the jury find from the evidence in the cause that at the time of making said deed of January 5, 1838, by Ely to Carswell and McClellan, said Ely was indebted to other persons besides those named in said deed, and altogether more than he was able to pay, and that said deed was made by and between the parties thereto with intent to secure the debts therein named, and with the intent that the said Ely might dispose of portions of the property conveyed thereby, in his discretion, to the payment of his debts as far as he saw fit, and with the intent to prevent the sacrifice of his property under execution, and with the intent that said Ely should exercise authority over and control the property mentioned therein as he chose to do, and he was permitted to remain in possession and use said property; they ought to find that the said deed is fraudulent, null and void as to creditors of said Ely, and any purchaser or purchasers for value from him; and such intents may be shown by the admissions or conduct of the grantees."

[7] "The court having declared the Sheriff's deed to Gallaher void, the jury are instructed that nothing should be credited on the judgment of May 5, 1841, on account of the bid made on the sale mentioned in said Sheriff's deed; and they are also instructed that if after deducting said bid from the credits which had been made on said judgment prior to the 31st of October 1846, there remained any part of said judgment unpaid to said Gallaher; and they also find that on the day last mentioned and while a portion of said judgment so remained unpaid, the said Patterson with the written consent of said Ely paid to said Gallaher such balance then remaining due on the mortgage from Ely to Gallaher, or more than was so due, and in consideration thereof took to himself from said Gallaher, who was then in lawful possession thereof, the quit claim deed read in evidence, conveying to said Patterson the said mortgaged premises, and said Patterson sold to Tatlow and put him in possession; and that at the commencement of this suit the defendant was in possession of the

part of the said premises sued for, claiming under said deed from Gallaher to Patterson; then the plaintiff is not entitled to recover in this suit, unless prior to the commencement thereof the plaintiff, or some person under whom he claims, had paid to Patterson or some one claiming under him, the amount due on said mortgage on the 31st of October, 1846, with interest thereon, and that plaintiff in this action has no right to apply any rents accruing from the land in dispute to the said debt or interest."

This, I hope, is an intelligible statement of the pleadings and evidence, and sufficiently explanatory to enable the Court to appreciate what remains to be said by way of argument; to which I now proceed—

From the record itself, as well as from this abstract of the record, it is submitted that the following propositions of fact are deducible, viz:

1. That Dr. Ezra Styles Ely, a leading Divine of the Presbyterian Church, residing in Philadelphia, enjoyed up to 1835 a very high and general reputation for learning, orthodoxy, piety, integrity and ability, and that in his own sect this reputation was almost an article of faith.

2. That nevertheless he was a credulous, impressible, dogmatic and opinionated man, ignorant but rashly presumptuous in business matters, and in an especial degree liable to become a victim to the arts and contrivances of designing men.

3. That he went to Missouri, taking with him about $40,000 in ready money belonging to his ward, which he invested in real estate in his own name, and that he became acquainted with and lived for some years in close companionship with a thoroughpaced knave, William Muldrow by name, under whose influence he lost his ward's property and his own, and fell into temptations under which his principles, never very firm, finally gave way; but that, he did not become, up to the spring of 1839, lost to all sense of right and honesty.

4. That in the spring of 1839, Mrs. Carswell left the family of Dr. Ely and returned to Philadelphia; that she never was in

Missouri afterwards; that in 1840-1, James H. Patterson formed a connection with Dr. Ely's family, and that under the influence of this person, Dr. Ely's moral sense became utterly perverted and darkened.

5. That the subsequent marriage of Mary Ann Ely Carswell to the appellant, and the attempts of her trustees to bring her guardian to a reckoning, caused that broken and imbecile old man to regard her and her husband as his personal enemies, in dealing with whom he was absolved from all the obligations of morality; that Dr. Ely returned to Philadelphia in 1843-4, and a little after 1850 his mental and bodily health, already much shaken, gave way entirely, and he became bed-ridden, paralytic and fatuous.

6. That his son-in-law, James H. Patterson, was in 1841 to 1842-3 enriched by means of the dishonesty and breach of trust to which he persuaded Dr. Ely to stoop, in fraud of Miss Carswell, afterwards married to Mr. Miles.

7. That Mrs. Margaret Carswell, widow of Samuel Carswell who died in 1812, was in 1838 at least seventy years of age. That she was a lady of the most exemplary character in all respects—of "spotless reputation," distinguished by the traits of "conscientiousness, benevolence, truth and piety," and "tenderly attached" to her granddaughter Mary Ann Ely Carswell, (the only and orphan child of her youngest son,) whose education and nurture had been Mrs. Carswell's favorite charge. That she was of a reserved nature, uncommunicative in respect of her affairs towards all, but particularly towards strangers, and that when she disliked a person her reserve towards him was impenetrable.

8. That she was strongly prejudiced against James H. Patterson before she saw him in the spring of 1843, and that there is every reason to believe that this prejudice had then existed for some time; perhaps was coincident with Patterson's first intervention in Dr. Ely's affairs.

9. That Dr. McClellan who had married in 1836 a daughter of Dr. Ely was a physician of eminence, residing in Philadelphia, and of unblemished reputation as a christian and a man. And that he knew nothing of the deed of January 5, 1838, until

several years after it had been executed and recorded in Marion county.

10. That both Mrs. Carswell and Dr. McClellan had large landed property in Missouri; and each of them gave to Dr. Ely a separate power of attorney giving him full control and management of their individual property, but no power of attorney which in any way referred to or gave him any power to defraud his creditors in respect of the mortgage or trust deed of January 5, 1838; that the power of attorney given by Mrs. Carswell was executed in March 1839, and that given by Dr. McClellan in the fall of 1842; and that these instruments were founded on the blind and misplaced confidence of Mrs. Carswell and Dr. McClellan in the integrity and business capacity of Dr. Ely.

11. That there is much in the record indicating that Mrs. Carswell and Dr. McClellan, after being made aware of the deed of January 5, 1838, were chargeable with damage resulting to their *cestui que* trust by reason of their negligence and unreasonable confidence in Dr. Ely, but nothing which can, as far as their *cestui que* trust is concerned, invalidate the security given by the deed of January 5, 1838.

12. That James H. Patterson's account of his interviews with Mrs. Carswell at Mrs. Lamb's in 1843, the only occasions on which he pretends to have conversed with her in his life, are in themselves highly improbable—are marked by him with all the *indicia* of a false story, and are directly unpeached and disposed by the testimony of Mrs. Lamb and Mr. Robinson.

13. That the testimony of Mrs. Patterson is absolutely incredible, and can only be regarded with indulgence on the hypothesis, that this lady unconsciously substituted for her own recollections of conversations and remarks occurring in her eleventh year, *the versions of those conversations which she and her husband afterwards became interested in establishing.*

14. That the only witnesses whose testimony tends in the least to the support of the theory of the plaintiff Caldwell, are James H. Patterson and Mary Ann, his wife, Allen Gallaher, William Forman and William Muldrow; and that these witnesses are plainly shown to be either mistaken or perjured, in all which they

say conducing to impute fraud to Mrs. Carswell and Dr. 'McClellan in respect of the deeds of November 1837 or Jan. 1838.

15. That the deed of January 5, 1838, made by Dr. Ely to Mrs. Carswell and Dr. McClellan, was founded on a most meritorious, valuable and sacred consideration. That it was made in good faith. That it was uncontaminated by the faintest admixture of fraud on the part of either of the trustees, or the *cestui que trust*, and that there is no other evidence, worthy of an instant's regard, which throws the smallest suspicion upon the motives of Dr. Ely himself at the time it was made, or upon the motives of Mrs. Carswell, Dr. McClellan or Mrs. Miles, at any time.

The three first propositions need not be fortified by any particular citation of passages in the record. They are so plainly established that anything in the way of comment would be a mere waste of time.

As to the 4th, that in the spring of 1839 Mrs. Carswell left the family of Dr. Ely and returned to Philadelphia, see p. 135. She never returned to Missouri, [id.] That James H. Patterson formed a connection with Dr. Ely's family in 1840-1, (see p. 136.)

That his connection with this man was most pernicious to Dr. Ely, must be admitted, when it is considered that not until Mrs. Carswell had left his house, nor even until after Patterson had become one of his family, do any acts, on Ely's part, appear, which unquivocally condemn that weak and misguided man; but in 1842 he does for Patterson's gain what was as indefensible as robbing a church. [See Patterson's own testimony, p. 116-120.]

In order to consummate this villainy, Dr. Ely was obliged to forge the authority of Mrs. Carswell and Dr. McClellan. Patterson says he had a power of attorney from them, which he had seen, and which authorized this. *We* see these powers of attorney, [p. 130 & 132,] and from this test alone and the maxim "*ex uno disce omnes*," can fully appreciate the value of Wr. Patterson's testimony. But I am anticipating.

Upon the 5th proposition I do not wish to dwell. The proof of it is full and sickening. The record of the cause in the Orphans' Court of Philadelphia, [p. 169 & fol.,] the monstrous manner in which Dr. Ely in 1846 made himself as wax in the

hands of Patterson, for the purpose of defrauding Mary Ann Ely Carswell of the land [the Gentry farm,] which was *almost entirely* redeemed with her money, [see p. 47], and the alacrity with which he in 1850 furnished to Tatlow for $200 what was considered a necessary additional means of consummating this fraud —see p. 51—are among the more salient acts which painfully prove, that at these dates he had indeed—

"Cursed his better angel from his side,
And fallen to reprobation."

Charity would wish to think that he was not even at this time accountable for his actions. At any rate, shortly afterwards he ceased to be so. See p. 137.

On 6th proposition we need not spend much time, for Patterson comes on the stand unblushingly proclaiming his own turpitude, [p. 117 & 120.] Besides this, it seems that he got some land, which in 1848, [see p. 186,] his conscience told him he could not hold if facts could see the light. It is an amusing instance of the degree to which he kept up the farce of appearing as Ely's creditor, that he told Mr. Robinson that he knew of some other unincumbered lands of Dr. Ely, out of which, if the deeds to him were set aside, he could "pay himself." Either this was a sorry farce—either Ely had after 1843 no land to sell, and especially since 1847, [see p. 196]—or else, he must have perjured himself on his application for discharge as an insolvent. [p. 144.]

7th. Mrs. Carswell's son, by her first marriage, was 70 years of age in 1858. She could not well have been less than 20 years older. In her answer to the bill of Mrs. Miles' trustees against her in 1848, she says she is in her 80th year, and has been confined to her room by ill health for the greater part of the last ten years, [p. 226.] The appellant has with propriety refrained from asking her son and daughter-in-law their opinion of the character of this estimable lady, but, at p. 139, [deposition of Mary Ann McGowan,] p. 140, [deposition of Judge Southerland,] p. 143, [deposition of Mr. Vogdes,] p. 145, (deposition of Rev. W. Steel,] p. 149-50, [deposition of Mr. Nassau,] p. 150, [deposition of Rev. Jno. W. Greer]—appear the most un-

qualified testimonials that can be ~~denied~~ desired. She was tenderly attached to her granddaughter, [see p. 137 & 139,] and had had charge of her since she was 2½ years old, [p. 147.] She was indisposed to speak of her affairs except to those in whom she felt full confidence, and was reserved towards strangers; [p. 137.] Was not communicative in respect of her business to strangers, and when desiring advice consulted her son Capt. J. J. Robinson. [p. 146.]

8th. In respect of her feelings towards James H. Patterson we have the following facts, viz: That she left Missouri, in the spring of 1839, and never returned. That Patterson married one of her granddaughters in the year 1840-1. That she never saw him until May 1843, and then only on the occasion of at most three short visits, one of them a morning call; [compare on this head what James H. Patterson says, see p. 114, when he speaks as if there was but one interview and conversation at which both Mrs. Carswell and Dr. McClellan were present, with what he says at p. 118 & 119, when he expands the conversations into 'several' with Mrs. Carswell, and says they occurred 'frequently' with Dr. McClellan; and with Mrs. Lamb's testimony, p. 146-7.] Mrs. Carswell had never *seen* Patterson before. This was in May 1843. In the month of June following she was at the house of her sister-in-law, Mrs. Robinson. Mrs. Robinson testifies that she occasionally heard her speak of Patterson during that visit—that she spoke of him as an unworthy man. The accustomed mildness of her nature seemed changed when she was compelled to contemplate this person. She expressed herself as having a feeling of loathing and disgust towards Patterson. She lost her patience when his name was mentioned, and did not like to speak of him or hear him spoken of. [p. 151.]

This testimony, I submit, is remarkable. There was a deeply rooted sentiment of aversion and distrust on the part of this aged and exemplary gentlewoman towards a man who had married one of her grand daughters. There was an indisposition to speak of him or ever to hear his name mentioned. This person had come into her presence for the first time on the occasion of three or at most four formal visits in the previous month. It is not conceiv-

able that this feeling of aversion dated from these visits. It must have been founded on something known or believed before; but perhaps and very probably the sentiment was strengthened when she looked upon his face and saw his mind in his visage. It is to a man whose presence vexed her, and the very mention of whose name she could not endure, that we are asked to believe that this uncommunicative old lady unbosomed herself without reserve at her first interview! (See Patterson's testimony pp. 113 & 114.)

9.10.11 It is unnecessary to dwell on these points. They are abundantly shown at pp. 135, 140, 142, 146, 147, 149, 132, 130, 225, 241 & 212 to 218.

12th. This twelfth proposition, though not more difficult of proof, is more directly important, and will be examined at greater length. It has already been seen in commenting on the 5th proposition, that it appears that Mrs. Carswell's aversion to this James H. Patterson preceded her first sight of him in May 1843. She distrusted and was disposed to shun him. He had married her granddaughter and she considered the connection unfortunate and discreditable. Under these circumstances she sees him for the first time. With his character she had long been familiar. It is not necessary that she should have heard of his dishonest appropriations to himself in the preceding year of part of the property which had been dedicated to securing her granddaughter against the total loss of her fortune. We are left to conjecture what particular instances of turpitude were those which excited the disgust of Mrs. Carswell. But we see plainly enough, that it was only necessary that she should know a part of the truth to justify her abhorrence of the man; and we are at liberty to assume, nay, we are driven to conclude, that some portion of the truth—some knowledge, if not of Patterson's conduct, at least of his character, had come to her, and that the natural result of it was her impatience and disgust not only at his presence, but at the very mention of his name.

It was impossible that this sentiment could be due to the few, short and formal interviews which he had with Mrs. Carswell in May 1843, at the house of Mrs. Lamb, of which he gives so astonishing an account. It was foreign to the habits of any one,

to plunge at the first meeting with a stranger into a discussion of business affairs for which no rational or natural introduction is suggested. But in an especial degree was this foreign to the habits of Mrs. Carswell. Always reserved and uncommunicative with strangers, she was, even with her friends, averse from the introduction into conversation of topics of business; on these subjects she had recourse to her trusted adviser, Capt. Robinson, and almost to him alone. (See the testimony of her daughter Mrs. Lamb, p. 146.) But we are asked to believe that this sensitive, shrinking, reserved old lady, on meeting in the most formal manner a man whose very name was an offence to her, slid at once into the most strangely confidential chat with him. This is the first difficulty in the way of our accepting his story. To my mind it is an insuperable difficulty; but this is not all. Being asked if any other persons were present, and if so, who, Mr. Patterson seems to have made a rapid but coarse mental examination of the position. He knew he was detailing a conversation as imaginary as any of those that make the reputation of Walter Savage Landor. The parties with whom his theory supposes the conversation to have been held were both dead, (Mrs. Carswell and Dr. McClellan.) To say that no one else was present when he saw Mrs. Carswell, would be liable to remark—nay, might be capable of flat contradiction. It might be possible to show that he never was alone with Mrs. Carswell in May 1843; whereupon, Mr. Patterson admitting that other persons *were* present, names such as have since died. Any one reading his deposition and believing him, would come to the conclusion that Mrs. Carswell and Dr. McClellan were together when he conversed with them, and that the conversations were numerous. He attempts to scatter them over the space "between the spring of 1843 and the year *1850" (p. 119.) But when brought back to the point he says in answer to the searching question, "on *what occasion* and *where* was it that they told you" &c., &c., "and who was present,

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* "From the spring of 1843 to 1850,"!!! He has been asked to particularise, but he knows better than to do this. *"Dolosus semper versatur in generalibus."*

and what induced the statement? (p. 118,) he answers, writhing in the extremity of his distress: "*It was in these conversations in Philadelphia. I don't know the occasion; don't remember who was present.* On one occasion in 1843 I well remember that Mrs. Mary Elliott and several of Mrs. Lamb's daughters were present and in conversation with Dr. McClellan. It was in the presence of his family. I don't remember what induced the statement except Dr. Ely's second marriage." A few lines further he says, it was "*in the same conversations*" that Mrs. Carswell and Dr. McClellan said that Dr. Ely had a right to dispose of the 'mortgaged property' to pay his debts. The attack is thus followed up, (p. 119,) "Did you not, about the year 1843, obtain possession of about 400 acress of land which is included in the mortgage from Ely to Carswell and McClellan?

ANSWER.—"*I think I did.*" Observe the singular caution of this conscientious man. He cannot be certain about such a trifle, so little interesting to himself personally—but he *thinks* he did. The defendant's counsel comes gallantly but a little indiscreetly to the rescue, and only succeeds in increasing the hotness of the fire. "Did you not, about the year 1843, or since that time, convey to your wife some part of the lands embraced in said mortgage? Answer, *I did.*

At page 114 Mr. Patterson says that both Mrs. Carswell and Dr. McClellan told him that Dr. Ely had authority from them, by power of attorney, to dispose of the property embraced in the mortgage to them. (He uses the words "*that* mortgage.")

Upon this it is to be remarked that up to this stage of the examination nothing has been said of the deed of January 5, 1838, (which is of course what is meant,) and we find subsequently that Mrs. Carswell had a mortgage from Dr. Ely to herself, (p. 157 and also p. 135,) and so had Dr. McClellan. But later, on the same page he says he means the mortgage advised by Mr. Bates, and this was the mortgage of January 5, 1838.

At p. 115, he says he saw the power of attorney in the hands of Dr. Ely. Nothing is said by him or any other witness to indicate the terms of the supposed power. But an instrument *is* produced by the complainant Caldwell and read in evidence. We see

it at page 130. It is a power of attorney from Margaret Carswell to Dr. Ely. It is dated March 26, 1839, and is evidently the paper mentioned by Capt. Robinson as having been given by her to her son-in-law when she went away from Missouri. She had a large landed property in Missouri, and up to this moment her confidence in Dr. Ely was unimpaired.

At page 132 appears a similar power from Dr. McClellan to Dr. Ely, dated October 15, 1842.

These two papers may be scanned in vain to discover any trace of a power to Dr. Ely to defeat the security of any conveyance, executed to Mrs. Carswell and Dr. McClellan as trustees. They evidently referred to the private individual property of the constituents, and can have no further operation by any intendment. It must be remembered that these papers are all read on the part of the complainant Caldwell. They are then the utmost which complainant could adduce to eke out the story of Patterson. Instead of aiding, they overthrow it. They show that the only powers of attorney existing are those that are produced—that if Patterson referred to these, he is simply mistaken; while, if he referred to any others, he is guilty of fabrication.

But when we consider what Mrs. Lamb says respecting this man and his interviews with her mother, we see that it is preposterous to claim for him the excuse of mistake or delusion. We see that he has deliberately misstated what occurred at those interviews—that Dr. McClellan was not present at them, but that she, Mrs. Lamb, was, and that business matters were not and could not in the nature of things have been alluded to. We see too from this lady's testimony that both Mrs. Carswell and Dr. McClellan were dead when she was examined. (p. 146-7.)

This analysis of Patterson's testimony might be extended much further; but it is believed to have been carried far enough. The man presents himself reeking, almost dripping with the foulness of his frauds against the poor child so cruelly wronged by her guardian and his son-in-law, who were bound to protect her by every obligation to which the bulk of mankind attribute a peculiar sanctity. But Dr. Ely after the departure of Mrs. Carswell from his house, seems to have descended rapidly in the moral

scale. It will be remarked that not until some time after her leaving Missouri does the first actual fraud appear on the part of this unhappy and discreditable old man. He was then old, embarrassed and solicited by influences to which his infirm principles could make no effectual resistance. We do not see the successive steps of his downward path; but on the 1st of February, 1842, the descent was complete. *That* was the date of a transaction which combined fraud, almost amounting to embezzlement, with forgery. (see p. 120.) It would be a relief to be able to believe, as there is indeed room for believing, that Ezra Styles Ely was no longer master of himself—that the "*mens sana in corpore sano*" was something that had passed away from him, and that he was henceforth the mere instrument of the designing men into whose hands he had fallen. If we reject this hypothesis, there is nothing to be urged by way of extenuating his heartless and wicked pillage of the orphaned infant of his too confiding friend.

It will be necessary to return to this subject presently in considering one of the legal points presented by the record. But this only furnishes a reason for not dwelling longer on in at this moment.

13. Passing to the consideration of the testimony of Mrs. Patterson, (p. 124-5,) we find that when she was about (11) eleven years old, she had "frequent conversations" with her father and grandmother on bnsiness matters, "within the years 1837 & 1845." She then proceeds to say, that Mrs. Carswell knew of the "mortgage." That deponent frequently heard her speak of it, and that they, (Dr. McClellan and Mrs. Carswell,) "frequently spoke of having given Dr. Ely the power of attorney to dispose of the property mortgaged, as he saw fit. They, McClellan and Carswell, knew that Dr. Ely was disposing of this property in various ways, as he thought best at the time, for the payment of his debts generally." (p. 125.)

A little above, speaking of 'the mortgage,' which of course can only mean the mortgage of Jan. 5, 1838, she said, "I have heard Mrs. Carswell speak of the existence of this mortgage a number of times; since that period, I think, Mrs. Carswell was

in Missouri three times between the years of 1836 and 1840. (p. 125.)

Again she says, "Mrs. Carswell was living in the house with Dr. Ely before and after he executed the deed of trust and mortgage. After making the deed of trust he went to St. Charles to consult Mr. Bates, and Mr. Bates advised him to make a mortgage instead of the deed of trust to the property. On his return home he consulted with Mrs. Carswell, and executed a mortgage to Mrs. Carswell and Dr. McClellan for the benefit of Mary Ann Carswell and other creditors. This was done with Mrs. Carswell's approbation and consent, as I remember of hearing them talk together at the time about it. I was comparatively young at the time, say about eleven years, but *I have a distinct recollection of the transaction.*." (p. 125.)

It will be observed that this lady does not profess to have ever seen the deed of Jan. 5, 1838. She even refrains from mentioning it by date. With the distinction between the deed of Nov. 1837 and that of Jan. 5, 1838, she appears quite familiar, styling the one a deed of trust, the other a mortgage. She gives a concise and most business-like, (almost lawyer-like) account of what was done, and assures us, that though "comparatively young" at the time, "say, about eleven years old," her recollection of the transaction is "distinct." Her testimony was taken in 1858—fully 20 years after the transaction spoken of.

Even if this person's testimony were material, it could scarcely be necessary to say another word; for it is simply incredible that any one thus professing to testify respecting a conversation on business matters occurring twenty years before, when the witness was a girl of at most eleven years old, (we may be sure that on *this* occasion she did not understate her age,) could speak, as Mrs. Patterson has done, *from recollection of that conversation.* It is inevitable that she must be merely retailing (innocently and unconsciously, let us hope,) the versions of that conversation which Mr. Patterson and herself had for so long a time been interested in establishing.

We are not left to inference alone on this point. Wherever Mr. or Mrs. Patterson ventures to testify on any subject on which

we can test their accuracy by reference to others, a fatality attends them. When they speak of matters from their nature known only to themselves and to the dead, they expose themselves by the inconsistency and inherent incredibility of their narratives. Where they speak of matters known as well to others as to themselves, they are proved to be, to use the very mildest language, conspicuously *inaccurate*.

Mrs. Patterson has no doubt of the circumstances connected with the making of the deed of Nov. 1837 and of Jan. '38, and of Mrs. Carswell having been conversant with them too. She knows that Mrs. Carswell assented to and approved all that was done. All this she knows by reason of the tenacity and exactness of her memory. If she be really able to speak thus from recollection, we must admit, that it is an instance of extraordinary excellence of memory. We have however the lady's word for it and nothing more. Let us proceed to apply such tests as we can to the accuracy of her recollection and the fidelity of her narrative. She says that her grandmother was in Missouri "three times between the years 1836 and 1840." The meaning is of course that she came to Missouri three several times, or paid three visits to the State, in that interval. This is a thing much more easily recollected by a child than a conversation on the dry and uninteresting business which engaged her attention in 1837-38; but what is more to the purpose, it is a thing respecting which we have the means of testing the accuracy of her recollection. The only surviving son of Mrs. Carswell testifies that "Mrs. Carswell first went to Marion with Dr. Ely, I think, in 1835. I went with them. She must have returned in the fall of that year. She went out in the spring and returned in the fall"— * * * * "Mrs. "Carswell next went to Missouri in the spring of 1836. I went "with her. I think she did not return from Missouri to Phila- "delphia till the spring of 1839. *She never revisited Mis-* "*souri after her return in* 1839. I went out in the fall of "1838 to bring her home. She declined to return in consequence "of the ill health of her daughter, Mrs. Ely." [p. 135.]

Mrs. Lamb also speaks of her mother's return from Missouri in 1839 as if it were her final return. [p. 147.] But Mr. Robin-

son's testimony requires no confirmation. He speaks of his mother having given to Dr. Ely a power of attorney in 1839 to manage her affairs there after her departure [see p. 136], and the instrument bears date on the 25th March, 1839, and is acknowledged in Marion county, Mo. The date of her departure then can hardly be doubted. We see from the testimony of her son, that she first went to Missouri in the spring of 1835—returned in the fall of that year—went out again in the spring of 1836, remained until the spring of 1839, and then left it never to return. She only went to Missouri twice, altogether, from 1835 to her death. Between 1836 and 1840 she only went thither *once*, spending three years there. * — Will it be said that this is a trifling circumstance, an immaterial thing? It is so, in itself. But for the purpose of testing the accuracy of this miraculous witness it has a marked significance. She is strangely wrong in respect of circumstances likely to fix the attention of a child. She claims to be strangely accurate in respect of matters the least of all others calculated to arrest her youthful attention, and most difficult to remember if her best attention had been given to them.

I submit then, that even if this lady's testimony were material, I would be justified in thinking that I had said enough to dispose of it. But what does it amount to after all? Literally, *nothing*. Let us receive it without any question whatever, and it only says that Dr. Ely with the knowledge and consent of Mrs. Carswell made a mortgage on January 5, 1838, to secure a debt owing to his ward Mary Ann Ely Carswell and other creditors. And *that in* 1842-3 both Mrs. Carswell and Dr. McClellan were "aware of the mortgage, and frequently spoke of having given Dr. Ely the power of attorney to dispose of the property mortgaged as he saw fit, and knew that he was disposing of the property in va-

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* Mrs. Patterson tells us [p. 125] "since that period [the date of the mortgage is referred to] I think Mrs. Carswell was in Missouri three times, from the year '36 to '40." We are entitled to the first statement, viz, that she went to Missouri three times after 1838, but let her have the benefit of the correction, and let no notice be taken of the rather singular fact, that, in speaking of her grandmother, she says "Mrs. Carswell." The lady is *business-like* to a fault.

rious ways as he thought best, for the payment of his debts generally." That is, that at least four years after the making of the deed of trust the trustees were in complicity with the encumbrancer in effecting a breach of their trust. Of this story I do not believe a word; but we will suppose it to be true to the letter—will it follow from this, or will it have the faintest tendency to establish, that the deed was *originally* tainted with fraud and, therefore, void? The question requires no answer. The intentions of the parties to the deed, *at the time it was made*, and not what they may have *subsequently* done or imagined, furnish the criterion by which it must stand or fall. The same remarks apply to the testimony of Patterson. But it is one of the wonders of this case that the learned judge * who tried it, and whose ability and erudition need no commendation from me, should have allowed such testimony as that of this brace of interested witnesses, deposing to immaterial matters, to set aside the verdict of a jury upon precisely the same points, and to overthrow a deed of which it may be said that it was *the one meritorious act* of Ezra Styles Ely occurring after January 1, 1839, of which this record makes any mention.

Mrs. Patterson identified a letter from Dr. McClellan to herself and her husband, dated August 2, 1843. This letter was produced by her, and it is supposed, was considered by the complainant Caldwell, to be relevant evidence in the cause. The court seems to have thought so too, for it was read and is made a part of the record. The objection of the defendant, now appellant, does not appear, but it is as available as if it did. This letter is *mere rubbish*. It neither proves nor tends to prove anything relevant to the controversy between Miles and Caldwell. Its pres-

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* The ejectment suit of Miles vs. Caldwell in which, as will presently be seen, this whole matter of fraud on the part of Ely, and Carswell and McClellan came up and was decided, was tried at the fall term of 1856, Judge Wells alone holding the court. The chancery suit was heard in 1860, before judges Wells and Treat, (Mr. Justice Catron being absent.) Of course, it is not known that there was any dissent on the part of the junior Judge; but the opinion of the court—the decree—was pronounced by Judge Wells.

ence on the record merely shows to what sort of testimony the Circuit Court listened in this cause; or rather, what trash it allowed to figure as a substitute for legitimate evidence; and in itself, it is almost enough to impeach the decree.

14. It has been shown what reliance is due to Mr. and Mrs. Patterson's * testimony. They are both interested witnesses, clad with the spoils of the breach of trust to secure immunity for which it was necessary for this exemplary lady to blacken her father's character. Their own participation in the fraud is not only confessed, but avowed. We see them contradicted at every turn, when we are able to compare their recollection with authentic history. For example, Patterson speaks of the powers of attorney given by Mrs. Carswell and Dr. McClellan to Dr. Ely. We see those instruments, produced by the complainant Caldwell, and at a glance we perceive that nothing can be wider of the mark than what Mr. Patterson says of them. The complainant is not at liberty to say that some other instrument was in contemplation of Mr. Patterson when he testified—for he has made *profert* of the only paper in existence to which Patterson's remarks could possibly apply. We examine the paper. It *completely refutes* Mr. Patterson. It is as palpable a contradiction as if Mr. Patterson has sworn that a certain figure was bounded altogether by right lines, while the figure on inspection, appeared to be a perfect circle. He ascribes to the power of attorney a force and effect which it is *impossible* that it should bear. Of course, I have nothing to do here with the question of what may have been *said* by Dr. Ely in 1841-2, respecting either of these powers. We are considering *not his* motives and wishes at that date, but the evidence of the motives and wishes of Mrs. Carswell and Dr. McClellan. *These* appear by the written letter. Luckily for us, "*litera scripta immota manet.*" It is to Patterson's misstatement of this written letter that I call attention. Can any one believe the misstatement to be innocently made? We see who profitted by it. We are told by Patterson himself that he was engaged in a stupendous fraud for which, unless he could show Mrs. Carswell and Dr. McClellan to be in complicity with him, even he could give no

* Ananias and Sapphira?

colorable pretext. Accordingly he concocts this pretence of the powers of attorney. It is not the first time that a knave has condemned himself out of his own mouth, or a transgressor furnished the means of his own undoing.

We then examine Patterson's testimony and compare it with that of Capt. Robinson, Mrs. Elliot, and Mrs. Lamb—and I am mistaken if it is necessary to go over that ground again in order to discredit him effectually, as to all that he says respecting Mrs. Carswell and Dr. McClellan. Not to speak of his first interviews and intercourse with either of these persons occurring in 1843, upwards of five years after the date of Jan. 5, 1838, all that he professes to remember is, I submit, clearly shown to be a mere fabrication; the product of reflection at a time succeeding the death of both the persons with whom he pretends to have had interviews, and cunningly devised to bolster up a monstrous fraud perpetrated confessedly in the beginning of 1842 by Patterson and Ely.

Nothing more will be said of Mrs. Patterson's testimony in this connection. If *that* is not disposed of, I am incapable of forming an opinion respecting evidence.

But there remain three other witnesses: Wm. Foreman, Wm. Muldrow and Gallaher. I repeat it, these are the *only* witnesses in addition to the pair already spoken of, upon whom, by any construction or intendment, reliance can be placed to show that even Dr. Ely contemplated fraud on any one by the conveyance of 1838; far less, that either Mrs. Carswell or Dr. McClellan participated in such fraud. Let us examine each in his order. Wm. Foreman heard Dr. Ely say "in 1839 or 1840," that he had made to Dr. McClellan and Carswell a mortgage "to secure them, as "they were his securities as guardians of his ward, who afterwards "as I learned, married one Thomas Miles, and that he had put into "this mortgage more property than was necessary, but that "they had given him a power of attorney authorizing him to sell "any of the property, and pay his debts, &c.

This witness, (who, as he tells us further on, is father-in-law of Moses Gentry, who stands in precisely the same relation to Miles that is occupied by Caldwell,) was well advised that all this would avail Caldwell and Gentry nothing, unless Mrs. Carswell

could be made party to it; *and accordingly* Mrs. Carswell, we are told, "was present," and "took part" in the conversation.

This witness is confident of the correctness of his memory. But both he and Mr. Gallaher are marked by a most singular coincidence in a flagrantly erroneous story. They both speak of a mortgage given by Ely to secure Carswell and McClellan, *as his sureties in his bond as guardians of Miss Carswell*, afterwards Mrs. Miles. There never was such a mortgage. Not only were Mrs. Carswell and Dr. McClellan not the sureties of Dr. Ely as such guardian, but nobody was; there is no trace any where of *such a bond, or such a mortgage, or such a power of attorney* as this witness speaks of. Not to remark upon his description of the latter as a power jointly executed by Mrs. Carswell and Dr. McClellan, until 1842 Dr. McClellan had executed no power of attorney at all to Dr. Ely, and that which he then executed concerned his own individual property alone. If then Dr. Ely said what Wm. Foreman says he did, he spoke of things which are proved to have had no existence. But this is hardly probable. Incapable, as Dr. Ely was of the competent despatch of business, he seems to have been acquainted with legal terms, and it is not credible that he would have resorted to what seems such an unnecessary and purposeless misstatement of facts so early as 1839. No motive can be assigned for it. We may conclude then, that Dr. Ely did not say what Wm. Foreman supposes. Did Foreman, in testifying as he did, innocently mistake or wilfully misstate?

It is indifferent to us which hypothesis be adopted. Either way the testimony of this witness is disposed of. He may very well be mistaken. Mrs. Carswell left Missouri in the spring of 1839. This conversation, at which she is supposed to have been present, is placed by the witness on the borders of 1839-40. He could not have failed to hear frequently since that time *the versions* of the conversations and statements of Dr. Ely, which his son-in-law as well as others *in pari delicto*, were afterwards interested in establishing. He may have innocently confounded some of these versions with his own memory of what perhaps at the time attracted but little attention. It must be conceded, how-

ever, that the coincidence of misstatement which marks the testimony both of this witness and Allen Gallaher, seems inconsistent with anything but "contrivance and design." How came they *both to be of a tale* and *both wrong?* Every one is familiar with the story of "Susannah and the Elders," and the discrepancy by which the holy lechers were convicted of perjury. But how much greater would have seemed the judicial blindness of these villains if, having a moment for comparing notes, and being aware of the question by which their veracity was to be tested, they had agreed upon the statement that the shade of an oak tree was the scene of their victim's guilt, and it had appeared that there was *no such tree* in the garden? But I will dwell no longer on this point, both because I think I have dwelt long enough, and because I shall have occasion to take another view of the subject presently, which in my judgment dispenses with any further remark.

In respect of Wm. Muldrow's testimony, it is not considered important to say more than that it is wonderful that such evidence was ever soberly considered as of any weight to impeach the intentions of a party doing what the strongest obligations of moral sentiment called on him to do. No time is stated, and neither Mrs. Carswell nor Dr. McClellan was present at a conversation, which, moreover, does not impeach even Dr. Ely.

Mr. Allen Gallaher is more diffuse, and obligingly furnishes us, as we go on, with the means of testing his accuracy. It is to be remarked, *in limine*, that neither Dr. McClellan nor Mrs. Carswell was present at the time when Gallaher took the acknowledgment of a blank * sheet of paper on which the deed of Jan. 5, 1838, was afterwards written, and all which Gallaher says refers to Ely alone. He never had any conference on the subject with Mrs. Carswell or Dr. McClellan. This being premised, what does Gallaher say?

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* The appellant will not detain the court by any remarks upon the gross official delinquency—*the signing of false certificates*, of which this witness admits he was guilty; but surely no one with proper notions of the obligations of duty as a magistrate, to say nothing of the sanctions of his official oath, could speak of himself as this witness does, without a blush.

He repeats, almost in the very same words, the mistake into which Wm. Foreman had fallen respecting Mrs. Carswell and Dr. McClellan being Dr. Ely's sureties. He tells us that the blank sheet on which was written the deed which he afterwards saw in St. Louis in 1856, contained, above the acknowledgment, the name of Ely and his wife, and the date of the paper written opposite to the signatures.

Does he mean that the *testimonium* clause was written out above the signature of Ely and his wife? Scarcely can his words bear this construction; but only thus understood, can what he says about the date, be verified by reference to the deed. But no construction can get over his mistake about the *signature of Mrs. Ely and her acknowledgment.* The certificate of acknowledgment was (he says) written out in full; all the rest, except the names and date, was blank. We see that only Ely's name is there, and the acknowledgment says nothing of the lady. (p. 62-3.) *

It would be convenient, perhaps, after this analysis, for the appellee to suggest that perhaps some other of the 27 blanks acknowledged that morning was filled up with this mortgage. But Mr. Gallaher identifies the deed used at the trial of the ejectment between Miles and Caldwell in 1856, with that which he describes—and that deed, (set out at p. 59 & seq. of the printed record,) contradicts him at every step. It is *not* a deed to secure McClellan and Carswell as sureties of Ely. It is *not* signed by Mrs. Ely; *not* acknowledgrd by her; and the date is *not* written on the left of the signatures. It occurs in the *testimonium* clause, in the body of the instrument, above the signature of Dr. Ely alone.

Are these discrepancies trivial? Let it be remembered that upon pretexts, the most flimsy, and recollections of the most equivocal character, the appellant has been deprived of his land. There can be no possible foundation for the decree unless the wit-

* This witness is so inaccurate from want of memory, or from deliberate purpose to misstate, that he cannot be relied on to state the particulars of a transaction two years old. Yet, only by imputing to him unusual fidelity and accuracy of recollection, can his testimony be even made to apply at all to the deed which is the subject of criticism.

nesses who impute fraud to Ely, and participation in that fraud by Carswell and McClellan, are singularly exempt from the errors to which human weakness is subject. We show that far from being this, they cannot for the life of them tell a straight story respecting any matter where we can compare their version of a fact with authentic history. Their narratives are not simply improbable, but contradicted in the most striking manner, both by themselves and others.

15. This proposition is almost a corollary from what has already been said. Nothing need be added to the record to show how large and how sacred was the debt of Dr. Ely to Miss Carswell. Every consideration called on him to secure it. It would have been infamous not to have done this. No one speaks of any act of Mrs. Carswell in reference to the deed of January 5, 1838, prior to 1839, and not then, unless Wm. Forman's testimony be understood to have this scope. As for Dr. McClellan, nothing is shown on his part in relation to it until 1842. I have already argued that at no time were they implicated in any fraudulent intention entertained by Dr. Ely. But, at lowest, there was an interval of a year or more during which neither of them is shown to have known of the existence of the deed. I would say more on this head at this place, but that I shall have occasion presently in another connection to refer to what might otherwise seem appropriate now. I will therefore here close my remarks on this proposition, and pass to the consideration of some topics which, though I may consider the case strong enough to dispense with them, yet I feel it my duty to lay before the court, because, in my judgment, upon them alone the appellant is entitled to a decree in his favor.

It does not seem unbecoming to say upon this review of the testimony that this is an unexampled case. Never in my own experience, nor in any recorded instance to which my researches have led me, has such a deed, in favor of so meritorious a creditor, been set aside as fraudulent in *fact*, upon pretensions and suggestions so unsubstantial supported by such miserable substitutes for evidence as we see here. Thus far the case has been argued on the equities growing out of the *facts* above examined.

But in the opinion of the undersigned there are certain legal considerations which effectually determine the case in favor of the appellant. And he states the following propositions as embodying the law which he considers applicable to the record :

1. The deed of January 5, 1838, is not void upon its face, and can only be assailed for fraud in fact. It must appear for this purpose that the grantor had a fraudulent intent, and that the grantees participated in it at the time of its execution. But there is no evidence, nor pretence of evidence of such a state of things.

2. The real grantee in the deed was Mary Ann Ely Carswell, an infant of nine years old, the largest and most meritorious creditor of Dr. Ely.

3. Not only was Miss Carswell the largest and most meritorious creditor of Dr. Ely, but in addition to the debt secured by this mortgage, it was her property (viz, six shares of Jefferson College stock) which paid off all but a very small fraction of the debt of Gallaher, the first mortgagee of the land in controversy.

4. Gallaher acquired no right whatever to the land in controversy by the sale under the general judgment for the mortgage debt, and therefore he stood in the light only of mortgagee. But in 1843 the mortgage debt was extinguished, chiefly, as has been said, by the property of Miss Carswell; and the appellee Caldwell was not in a position entitling him to assail the deed of Jan. 5, 1838.

5. Every matter alleged in the bill, every suggestion of fraud, every circumstance relied on in equity to enjoin proceedings on the judgment at law (except the matter of improvements on which the case did not turn) had been already the subject of judicial examination in the ejectment suit, and had been determined in favor of Miles and against Caldwell, by a verdict which the court had refused to disturb, and on which it had given judgment. Of all these questions a court of law had concurrent jurisdiction in the first instance with a court of equity; and having tried and determined them, equity cannot review its decision or attempt to relieve against it.

The two first propositions will naturally be considered together.

The third and fourth also can be similarly grouped—and the fifth stands by itself. The establishment of the first ~~or the~~ second, or and the third and fourth, or the fifth, will dispose of the case in favor of the appellant.

In support of the proposition that the deed was not void on its face, it is unnecessary to say more than that it gives a present estate to the trustees, as to all the property contained therein, for the benefit of the wards of Dr. Ely; and they were authorised by the terms of the deed to take all of it into immediate possession. That they did not do this is to be regretted, and their failure may have rendered them liable for neglect of duty as trustees, but cannot be seized upon to defeat the trust, as against the beneficiaries of it. If the trnstees had actively entered upon their duties, all of the objections made to the deed, would have been obviated. For, the terms of the deed conveyed not only unimproved lands, but a well stocked farm. The beneficiaries of the deed were infants of tender years, whom delay in receiving their money, provided only that it was secured, principal and interest, would rather benefit than injure. The right of taking possession of every thing, the farm, its stock, negroes, utensils, and also the homestead, and of carrying it on during the five years for the benefit of the *cestui que trust* was conferred on the trustees. To do this with profit, or even without loss, the provision of hay, corn, oats, &c., and the services of the negroes, so far from being inconsistent with the plan proposed, was essentially necessary and proper. And this was the construction given to a similar deed in 11 Graltau, p. 348, Cochran vs. Paris; and besides this point arose and was determined in the ejectment suit. The refusal of the court to decide this deed to be void on its face, was one of the reasons assigned for a new trial. See p. 165.

As to the question of *fraud in fact*, it must be remembered that in order to injure Miss Carswell, it is necessary not only that Ely should have entertained a fraudulent intention, but that the grantee in the deed should have participated in it. The law on this subject in force in 1838 is to be found in Rev. Co. of Mo, 1835, p. 283, § 3, and is in the following words: "No such con-'veyance or charge shall be deemed void in favor of a subsequent

'purchaser, if the deed or conveyance shall have been duly ac-
'knowledged, or proved and recorded, or the purchaser have actual
'notice thereof at the time of his purchase, unless it shall appear
'that the grantee in such conveyance, or the person to be bene-
'fitted by such charge, were party or privy to the fraud intended."

It is plain that the statute contemplates the *cestui que use* in each case. A conveyance is sometimes a deed of sale or gift to some one directly. It may also be made to a trustee for the benefit of some one else. The statute of Missouri contemplating this condition of things disregards the *persona interposita*, and has reference to the real party in interest. "The grantee in such conveyance" (where there is no trustee) "or the person to be benefitted by such charge" (where there *is* a trustee) must participate in the fraud, or the conveyance is not avoided by the fraud of the grantor alone.

This construction is surely conformable to reason. It would be intolerable to give such an interpretation to the act as to protect a fraudulent *cestui que use* by the interposition of an innocent trustee. Indeed the well known rule is, that, though the trustee may refuse to accept the trust, or even though the name of the trustee be a blank, the trust stands and is enforceable, and nothing that a trustee can do will be allowed to defeat the trust. He will not be permitted to betray it, even if he has the wish to do so. The *cestui que use* then, who sometimes is identical with the grantee and sometimes a different person, is the man whose guilty purpose must combine with that of the grantor to let in a subsequent purchaser, when the deed assailed has been duly acknowledged and recorded, or notice of it has been given to the subsequent purchaser. In this case, the deed of Jan. 5, 1838, was recorded January 8, 1838. (See the bill of complaint, p. 7 of printed record, and the agreement of counsel filed in MS. in this cause, confessing that the record is erroneous at p. 63, and that instead of 1856 we should read 1838.)—If this point be well taken, there is an end of the case of the appellee. There is not only no suggestion, but there is scarcely a legal possibility that the heirs of Clement Lee Brady and Miss Carswell—infants of years too tender to understand the nature of the

relation of debter and creditor—conspired to defraud anybody. Upon the hypothesis that the deed of January 5, 1838, was made and recorded without notice to the trustees, it operated from the time of its being deposited for record as a security for the benefit of the *cestui que trust*. And not even the subsequent direct refusal of Mrs. Carswell and Dr. McClellan to act as trustees, still less their failure to do anything evincive of their intention either way, would defeat the trust in favor of Dr. Ely's wards.

It is submitted that the testimony in this cause points irresistibly to the conclusion that after the deed was made and recorded, the trustees either remained ignorant of it or were passive and indifferent respecting it, doing nothing, though their duty if the trust were accepted by them at all, required them to be active in the discharge of the functions imposed on them. Now if this were the case for a year, a month, or any shorter time from January 5, 1838, the consequences of such *laches* to the trustees, when called to account by the beneficiaries of the deed, may be a question. But it is a shocking *non sequitur* to infe
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invalidate the trust, is so well settled and so consonant not only to natural equity but to the universal current of decisions, that it is unnecessary to do more than to refer to it. But it is deemed not inappropriate to allude to the decision in 24 Mo. R. p. 70, Hardcastle vs. Fisher, to show that the courts of Missouri do not even accept the rules laid down by other tribunals of authority, as to the application of the maxim, that an instrument void by reason of fraud in part is void altogether. The difference of this interpretation from that which obtains in New York is rendered more striking when we remark, that in the case quoted *several of the cestui que trusts* were convicted of fraud coincident with the making of the deed. Yet the court allowed the deed to stand for the benefit of *bona fide* creditors not participating in this fraud, though declaring that as to the parties guilty of the fraud, the deed was a nullity.

This decision is of importance in another respect. It declares a deed of three parts void as to such of the parties of the

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The general equitable rule that a trustee can do nothing to invalidate the trust, is so well settled and so consonant not only to natural equity but to the universal current of decisions, that it is unnecessary to do more than to refer to it. But it is deemed not inappropriate to allude to the decision in 24 Mo. R. p. 70, Hardcastle vs. Fisher, to show that the courts of Missouri do not even accept the rules laid down by other tribunals of authority, as to the application of the maxim, that an instrument void by reason of fraud in part is void altogether. The difference of this interpretation from that which obtains in New York is rendered more striking when we remark, that in the case quoted *several of the cestui que trusts* were convicted of fraud coincident with the making of the deed. Yet the court allowed the deed to stand for the benefit of *bona fide* creditors not participating in this fraud, though declaring that as to the parties guilty of the fraud, the deed was a nullity.

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the third part as were guilty of fraud—thereby ascertaining the meaning of the word *grantee* in the section of the statute quoted —for the statute of 1845 is in this respect a copy of the act of 1835. The necessity for deciding the exact case at bar has not arisen in the State courts, but it is impossible to doubt that when it *does* arise, the decision will be that the person for whose benefit the deed purports to be made is the *grantee* whose fraud will avoid it, and not the *persona interposita*, who in contemplation of a court of equity has no interest in the property conveyed, but only a duty to perform in respect of it. But in this case the true deduction from the testimony is that Mrs. Carswell, an aged gentlewoman, ignorant of business as almost all of her sex, and Dr. McClellan, a non-resident, were in fact entirely neglectful of their charge, even if they were aware of it; that they had a blind confidence in Dr. Ely's judgment and integrity, and that without scrutiny they acquiesced in what he was disposed to do for his wards. As before stated, this negligence may have exposed them to animadversion from the *cestui que trust*, but cannot be quoted to defeat the estate which they were appointed to protect.

We come now to consider the respective positions of the complainant and respondent in the equity suit relative to this land.

It will be remembered that in November 1837 Ely made to Gallaher a mortgage of this land, which was duly recorded, and Caldwell claims under Gallaher, the mortgagee. In Jan. 1838 he made another mortgage or deed of trust conveying the equity of redemption in it to Mary Ann Ely Carswell, his ward, to secure a large debt. Judgment of foreclosure was confessed for this debt in 1843, and under it the land in controversy was sold to Carswell and McClellan, who conveyed it to Mr. Miles, her trustee. Now the mortgage to Gallaher was prior to that under which Mr. Miles, the respondent, claims; and there is no question made as to the *bona fides* of the debt to Gallaher. Hence, in prosecuting his ejectment suit, it became necessary for Miles to show that this mortgage to Gallaher was satisfied, and that no title higher than that of a mere mortgagee was ever acquired under it by Gallaher. For, if the mortgage debt remained unextinguished, in whole or in part, the subsequently acquired title under the second mortgage

could not prevail against him or his assignee in possession of the land; and if, while the mortgage debt remained, the title of Gallaher became absolute by sale of the equity of redemption to him, then the second mortgage was defeated altogether.

The court at the trial of the ejectment suit declared that the sale of the mortgaged premises under a judgment for the debt secured by the mortgage, without a foreclosure of the mortgage itself, was a nullity, and that Gallaher acquired no title by this proceeding. On this subject the case of McNair et al. vs. O'Fallon et al., 8th Mo. Rep., p. 188, was precisely in point, and was conclusive. There was then no acquisition of the complete title, legal and equitable, by this proceeding. The remaining question was: "Has the mortgage been satisfied?" It has been, most fully.

In the first place, the satisfaction of this mortgage was one of the issues tried in the ejectment suit between Miles and Caldwell in 1856 and determined in favor of Miles. This matter was then thoroughly canvassed and sifted, and is settled by the verdict of a jury and the judgment of the court upon that verdict. But of this more will be said presently when the fifth proposition is considered.

In the second place, if this mortgage was not satisfied, what business had Caldwell in a Court of Equity? He comes into a Court of Equity to set aside a title made under a second mortgage. He holds under the first, being in possession. But if the first be unsatisfied, he has no occasion to ask for the setting aside of the second mortgage; for the non-satisfaction of the first mortgage rendered his possession under it unassailable.

In the third place, if the first mortgage be unsatisfied, Caldwell's remedy at law is complete, and he can not come into a Court of Equity to seek relief.

But let us look at the evidences of satisfaction which were presented to the court below, and which are the same on which the jury passed in 1856.

We have to say *in limine*, that the proceeding resulting in the judgment in favor of Gallaher, was as against the mortgaged property, *a nullity*; (McNair vs. O'Fallon & al. 8 Mo. R. 188, before cited) consequently as against the subsequent incumbran-

cers of that mortgaged property Gallaher was not entitled to onerate it with either the costs of the suit, or the compounding of the principal and interest of the mortgage which was effected by that arrangement between himself and Ely.

| | | | |
|---|---|---|---|
| The original mortgage debt was ..... | | | $2,866 97 |
| Interest at 8 p. ct. to 1st Nov. '43, say 6 years | | | 1,376 14 |
| Amount..... | | | $4,243 11 |
| The following credits are applicable to the liquidation of this debt, all of them made before 1st Nov. 1843, viz: | | | |
| This sum (see p. 36 of printed record) | $ 313 50 | | |
| This sum (see p. 39 of printed record) | 625 14 | | |
| This sum for Jeff. Med. Col. stock (p 41) | 3,000 00 | | |
| Dividends on this stock received by Gallaher in November 1843..... | 180 00 | 4,118 64 | |
| Showing a balance of..... | | | $124 47 |

But this is not all. A large quantity of real and personal property was afterwards levied on, (see pp. 40, 41, 42 & 43) but what became of it we are not told. There is no return respecting the disposition made of this property. Obviously it is upon the face of it more than sufficient to satisfy ten times what remained due on the mortgage debt. Fifteen negro slaves are, among other things, levied on. The levy is a satisfaction unless the contrary appears by clear evidence. [1 Salkeld 322, 1 Archbold practice p. 289 (side paging), Tidd. 922).

When we refer to the agreement between Gallaher and Ely, (p. 46,) we see that Gallaher was to release his hold on all the property bought by him under the judgment for the mortgage debt, on receiving payment of that debt from Ely. It may be said that it does not appear that Gallaher got any deed from the Sheriff for any except the mortgaged property. For *that* he did get a deed, which, as we have seen, was worthless in a legal or equitable point of view. The supposed balance of $955 paid to Gallaher in 1846 through the hands of Patterson, could be made up only by cancelling the credits of $313 50 and $625 14, bid by Galla-

☞NOTE.—In stating this account, appellant's counsel, strangely enough, lost sight of the two payments shown at pages 32 and 33 of the printed record. These are $229.35 and $197.73, making a sum of $427.08—which not only extinguishes the balance ($124.47) of the mortgage debt, but shows an over-payment of it by the sum of $302.61! It appears, then, by simple arithmetic, that the debt was paid, without reference to the legal presumption which the text proceeds to invoke.

her at Sheriff's sale of Ely's lands. But did any court ever hear before of such a mode of reviving a satisfied mortgage against a second encumbrancer? The private arrangement by which Ely redeemed this property, could not re-instate the first mortgage. It is quite consistent with the terms of that agreement that Gallaher in 1846 directed the Sheriff, if the deed were not already made, (and that such might be the case, see 19 Mo. R. 408,) to make the deed to such person as Ely might designate; and if the Sheriff had already made the deed to Gallaher, that *he* conveyed to Dr. Ely's appointee. If, when Ely or Ely's representive came in to take a re-conveyance from Gallaher, the latter had chosen to ask for the whole of his debt in money, re-delivering the Jefferson Medical College stock, there would have been upwards of $4000 to pay. Unless something was re-conveyed to Ely, there remained, (Gallaher keeping the stock,) less than two hundred dollars to pay, saying nothing of the presumed satisfaction of *that* by the levy before spoken of.

But I am detaining the court uselessly on this head. The bill in this case is not brought for an account. It does not proceed for a balance of the mortgage, and offer to set off the rents and profits of the property since 1843, or even 1846. If any such thing had been proposed there are no proper parties to the suit.

There is another view to be taken of this matter, although the undersigned feels that he is scarcely justified in saying so much on a point so plain. Nothing can be clearer than that it was the intention of Gallaher in 1843, (p. 46,) to give up all the rights under the mortgage to Ely, upon being paid his debt. In other words, he continued to treat the matter as a mortgage, although he had a deed which he may have supposed a valid muniment of title. It would be grossly injurious to Ely to impute to him, in making this assignment, any other purpose than to liberate his property for the use of his creditors, of whom Miss Carswell, whose property had gone so far to release the mortgage, was the chief and most meritorious, besides being second mortgagee.

Unfortunately before Nov. 1, 1846, Miles and Ely were at law. Bitter feelings existed on both sides. On the part of Ely we may be sure there was no exception to the rule, "*odisse quem*

*læseris.*" He had no longer any solicitude to protect his ward. There was perhaps a disposition to be revenged on her for demanding what was her own. But no malignity or wrong-headedness on Ely's part, could cause any transfer of his agreement with Gallaher to a third person, to vest in such third person a better title, a more beneficial position towards the mortgaged premises, than Ely himself had. If Patterson was the assignee of that agreement, then, as he tookt he reconveyance of all the rest of of the land purchased by Gallaher, (for he must be taken to have done this,) he took, in respect of this mortgaged property, only such interest, as Ely could convey if the mortgage and judgment were out of the question; but nothing more. Patterson is estopped to deny that he took such a re-conveyance of the other lands. If he did not, there is no explanation of the large balance which he claims to have paid to Gallaher.

The probability certainly is that when Gallaher made with Ely the agreement at p. 46, he directed the Sheriff to release the levy on Ely's personal and real property. Now the law on this point is very well settled. An unexplained levy raises a presumption of satisfaction; to overthrow which there is need of testimony, no trace of which appears here. A levy on sufficient property is *prima facie* satisfaction, and if the property is released from levy by order of the plaintiff, the presumption becomes conclusive.

In fact, Gallaher when making his deed to Patterson, dated 30th October, 1846, recites the full satisfaction of his mortgage.

To the terms of that deed, to the agreement of 1843 (p. 46,) and the deed from Ely to Tatlow in 1850, (p. 51,) the attention of the court is particularly directed.

This brings us to the consideration of the equitable standing of Caldwell. He and those under whom he claims had become in 1850, if not long before, quite satisfied of the infirmity of their title to this land by virtue of the Sheriff's deed to Gallaher. It was necessary to obtain some other muniment, or the title was in Ely's vendee under the mortgage of Jan. 5, 1838. The luminous idea occurred to them to get a deed from Ely for a nominal consideration, and then to impeach the mortgage of Jan. 5, 1838, for fraud. The object of the deed from Ely was of course to

put Tatlow and those claiming under him in a position to contest the validity of the deed of Jan. 5, 1838. If they could, by virtue of it, justify their claim to the designation of *bona fide* subsequent purchasers, they were permitted by law to impeach the prior deed of Ely for fraud.

The parties then stand thus: Caldwell claims under a speculator who in 1850 obtained from Ely for $200 a quit claim deed of the large tract of 447 acres, of which the premises in controversy are part; and this is his only source of title. Miles claims as the trustee of Ely's ward under a deed made in 1838 to secure a debt to that ward, then stated in general terms to be upwards of $30,000, which subsequently was shown to be about twice that sum.

It has been stated that Caldwell and those under whom he claims in this controversy, stand on the quit claim deed of Jan. 1850 alone; for if they stand on the mortgage of Nov. 1837, the ground of the jurisdiction of a court of equity fails entirely. The object of this proceeding is to set aside and to declare to be a nullity a mortgage deed executed Jan. 5, 1838. In behalf of persons claiming under a prior mortgage there is no occasion for the aid of a court of equity. No matter how pure and meritorious the motives and conduct of the parties to the second deed might be, it could not, either at law or in equity, form any obstacle to the claims of those making title under a prior mortgage. It is only under the supposed claim derived from the deed of January 1850, that they obtain a position from which to assail in equity this deed of Jan. 1838. If they have any rights under the deed of Nov. 1837, they are free to assert them without assailing the deed of Jan. 1838, and without the possibility of being obstructed by it; consequently in this character they have no right to resort to a court of equity; and it is only in the other character of claimants under the deed of January 1850, that they have any pretence for invoking equitable interposition at all.

Upon this quit claim deed then the complainant Caldwell relies to give him a standing from which, in a court of equity, he may overthrow the title of Miss Carswell, a title resting upon an unsatisfied debt of about $60,000 secured by a mortgage; but this

is not all. Almost the whole of Ely's purchases of land in Missouri—indeed, we should be justified in saying absolutely *all*—were made with the money of his ward. Had early steps been taken for that purpose, it is not doubted that from this cause alone a trust resulting to her could have been established in respect of them all. This was not done, and of course it is too late to do it now; but this property being given to her by way of a second mortgage, the first encumbrance was paid off almost entirely by her property, to-wit: The six shares of the Jefferson Medical College stock and dividends amounting to $3,180. So that Miss Carswell's property has been appropriated to the payment of more than the principal of the original mortgage debt, and she purchased it under the second mortgage also. But in order to appreciate fully the position of Mr. Caldwell claiming under Tatlow, another circumstance is worthy of note. When Caldwell purchased the portion of the Gentry farm involved in this suit from Tatlow in September 1849, he gave to the vendor a promissory note, and received in return a deed with covenants of warranty; and this note long after its maturity was assigned to one Louthan, who has sued Caldwell on it. This cause is still pending, and it appears from the answer filed by Caldwell that he has paid no money at all on account of this land, and is to pay none if he fails in this suit between him and Miles, (see p. 145 of the record.) The inference is irresistible that when Caldwell purchased he intended to lay out no money until the title he got from Tatlow was protected by the statute of limitations, the period of which in Missouri is ten years; and in this view Tatlow must have acquiesced, for otherwise there is no accounting for the delay to collect the purchase money from Caldwell. Suit was not brought on this note until 1858. Now the act of the legistature of Missouri shortening the period of limitations as to lands, from 20 years to 10, was passed in February 1847. It was not then until the full period of ten years after the passage of this act, that Tatlow, or those claiming under him, made an attempt to compel the payment of this purchase money.

Caldwell then stands before the court as a party claiming under Tatlow, who is able to show in his behalf nothing but a pur-

chase from Ely, by quit claim, for $200 in 1850, of all the right, title and interest which he, Ely, had at that time in the Gentry farm; of which the eighty acres involved in this suit, are shown to be worth more than $2000! (page 169 of printed record.) Ely had mortgaged this farm before in 1837 to Gallaher, and had made a second mortgage of it to his ward who was his largest, and as has been already said, his most meritorious creditor. The first mortgage had been paid off, almost wholly with the money of his ward, thus increasing the debt of Ely to her. The second mortgage is wholly unsatisfied, and the voluntary purchaser of a litigated claim for a nominal consideration seeks in a court of equity to set aside the title of Ely's ward under this second mortgage, which was duly recorded twelve years before, the date of this deed, not because of the non-existence of the debt which it sought to secure, not because of any fraud on the part of his ward, but because it is alleged that the persons named as trustees in that mortgage allowed Ely to treat the property as if the mortgage had not been made; an allegation which so far as it is attempted to sustain it, so as to make this misconduct of the trustees cotemporaneous with the making of the mortgage, is entirely unsupported by even a shadow, or pretence, of proof.

The respondent Miles, now appellant, contends that, even if the facts were as Caldwell insists, still the latter has no *locus standi*, no standing in a court of equity, and in support of this view he cites, 18 How. 263, Orton vs. Smith; 7 Peters 252, Vattier vs. Hinde, (271-2-3.)

But not only, as has been already argued from a consideration of the testimony, are the facts entirely different by the test of this evidence, but the particular fact relied on to set aside this deed of January 5, 1838, to-wit: *fraud in fact* on the part of Ely on the one hand, and Mrs. Carswell and Dr. McClellan on the other, (as well as the complete satisfaction of the mortgage,) had been already tried between the same parties in respect of the same subject matter in 1856, in the action at law. This is shown, beyond controversy, by the record of the ejectment suit, and the proof of what occurred at the trial. It is shown, and indeed admitted in the bill of complaint, that the defendant in that action

set up the fraud which is the foundation of this suit in equity, and that the issue thus made was passed upon by the jury under the instructions of the court; which instructions, though not technically a part of the record, are shown *dehors* the record to have been given on that occasion, and of course to have controlled the action of the jury. (See p. 29 of printed record for agreement on this head.)

On this head I remark that it is plain from this record and these proofs, that in the trial at law Caldwell gave in evidence all his claim of title under the mortgage to Gallaher, dated November 1837, and also under the conveyance to Tatlow from Ely in January 1850. The fact was so beyond question—but moreover we contend and prove that this *fact* is demonstrated rigorously by an examination of this record. For, it is admitted that the mortgage of January 5, 1838, was attacked by the defendant Caldwell for fraud, and it appears from the instructions of the court, that he also set up a claim to the possession under the mortgage to Gallaher which he alleged to be unsatisfied. The court instructed the jury that if the mortgage (which was not impeached for fraud) was unsatisfied, Caldwell's claim under Gallaher was a complete defence to the action; but that if the mortgage was *satisfied*, then that defence failed. Hence, we see that the title under Gallaher was before the jury—and their verdict shows that they found the fact to be *that the mortgage was satisfied.*

So far there was no occasion to touch the question of fraud; for as long as Caldwell claimed under a prior mortgage deed, the only objection to which was that it had been discharged and satisfied, it was immaterial whether the deed of January 5, 1838, were fraudulent or not; and no instruction could have been properly given touching the effect of fraud in connection with this second deed, until Caldwell had, at least in theory, a position from which he could impeach it. Therefore it is a necessary consequence that Caldwell exhibited himself on that occasion in the character of a creditor or purchaser under Ely. There is no pretence that he figures as a creditor—but he does claim, as privy in estate with Tatlow, to be a purchaser. The deed then from Ely to Tatlow of January 1850, and the subsequent conveyance to Cald-

well, must have been given in evidence at the trial of the ejectment; in other words, the *documentary* evidence was the same in that action at law that is set forth in this equity proceeding. This is true and, I submit, *rigorously proved.*

There is nothing to show what evidence on the subject of fraud was offered then, nor is it important. *The issue was made and determined.* That is proved and even admitted. It is not pretended that by reason of any accident, mistake or any other cause, there was any failure on Caldwell's part to produce *all* his evidence—and there is really no dispute that the very matter for which the attempt is now made to enjoin the judgment then obtained, was one of the issues in the action at law, and was then determined in favor of Miles, and against Caldwell. This was clearly and distinctly set up by way of plea, and to this plea there was a replication. This plea was, as above shown, clearly proved, and the appellant insists, that thereupon the bill should have been dismissed. See Hughes vs. Blake 6 Wheat. 453, where not only this principle was decided, but the matter pleaded was precisely what it was in this case, viz, a determination at law between the same parties of the very matter which the complainant sought to re-examine in equity.

In the case at bar, the matter which Caldwell sought to set up, was *fraud in fact;* and that courts of law have concurrent jurisdiction of this subject with courts of equity, it surely needs no citation of authorities to show. The rule in such cases is, that the court which first obtains jurisdiction of the cause (Morrell vs. Locke 16 Ohio R. 373—Smith vs. McIver. 9 Wheat. 532) must determine it conclusively; and when determined by a court of law it is as completely *res adjudicata* as if it had been the subject of a decree of a court of equity. I quote on this subject, though it seems almost impertinent to quote any thing, Foster vs. Wood 6 Johns. ch. p. 86; Fleming vs. Slocum 18 Johns. 403; Gardner vs. Buckbee 3 Cow. 120; 2 Mylne & Keene 423, Harrison vs. Nestleship & Fuller; 1 Johnson cases 436, Guen vs. Gouverneur & Kemble; Anderson vs. Roberts, 18 Johns. 514-534; Orcutt vs. Orms, 3 Paige's Ch. R. 459; Brown vs. Swann, 10 Peter's R. p. 497; Crane vs. Rennell & Boutwell, 10 Paige Ch. 333; Fletcher

vs. Rapp, S. & M. Ch. 374; 1 S. & M. 238, Houston & Royston 4 S. & M. 358, Thomas & al. vs. Phillips.

If the particular fact which is the only one relied on to support the jurisdiction of a court of equity in this cause, (for the evidence on the subject of improvements breaks down entirely and the decree takes no notice of it) had been set up by a special plea and been determined against Caldwell in the former action, the case of Outram vs. Morewood, 3 East 345 and fol., is conclusive that the same matter could never be re-examined between the same parties. To the same effect are the cases of Gardner vs. Buckbee, 3 Cow. 120; Doty vs. Brown, 4 Comstock, 71; Kitchen vs. Campbell, 3 Wilson 304; Betts vs. Starr, 5 Conn., 550; Kent vs. Kent, 2 Mass. 338; 2 Compton, Meeson & Roscoe, 728; 4 Cow. 55 Burt vs. Steinburgh; Beebe vs. Eliot, 4 Barbour's S. C. R. 457; and numerous other cases which it would be easy, but it is conceived unnecessary, to cite. And the cases in 3d Cow. p. 120— 3 Wilson 304, and 4 Comstock 71, are no less decisive of the principle that if it appears, *dehors* the record proper, that a particular fact or issue has once been tried and decided between the same parties by a court of competent jurisdiction, these parties are forever concluded by such determination.

To this it was replied by the complainant in the court below, that the issue in this case was tried in an action of *ejectment*, and that the verdict and judgment in an *ejectment* conclude nobody and establish nothing.

It is of course impossible to say on what grounds that court decided this cause—that is, there is nothing on the record which can enable us so to pronounce. We must infer that every point taken in defence was decided to be unavailing—to be either invalid in law or not supported by the evidence—and that the main point relied on by the plaintiff was established. It becomes therefore important to examine how far this notion of the insignificance of a judgment in ejectment, which may have influenced the Circuit Court, is supported by reason or authority.

Now, it is very true that a verdict and judgment in ejectment are not conclusive of *the title* of the parties, *because* the verdict and judgment in that action, without more, simply determine the

*right of possession* at a given time; but every one knows how much even this modification of the rule arises from the fact that the parties to an action of ejectment at common law are wholly fictitious and so the record would always be, as to any actual person, *res inter alios acta*, (see Adams on ejectment by Waterman, p. 420.) But in Missouri the law has for more than forty years been that "the action [of ejectment] shall be prose-"cuted in the real names of the parties thereto, and shall be "brought against the person in possession of the premises claim-"ed." (See Rev. Co. of 1825, 1835, 1845 & 1855, title ejectment.) Ejectment is in Missouri an action of trespass wherein the party entitled to the possession of land may recover as well the possession as damages for the withholding of it. And it is like any other action of trespass as to all the incidents by virtue of which *conclusiveness* may be predicated of any issue tried and determined between the same parties. If no more appears by the record than that the right of possession was on a certain day adjudged to be in the plaintiff, of course it does not follow from such a record but that the right of the plaintiff expired on the following day. But if it appear from the record proper, *or be shown in evidence, dehors, in connection with the record*, (3 Cow. 120, 3 Wilson 304, 4 Comstock 71,) that the right of the plaintiff was deduced through a particular deed, which was attacked by the defendant as being fraudulent and void by reason of any extrinsic illegality resting on matter of fact, and that the question of such fraud was distinctly made and determined between the very same parties; then the appellant confidently submits that both parties are bound by the finding and decision. I cannot forbear quoting from the case in 4 Coms. 71, "The judgment of a court of com-'petent jurisdiction on a question directly involved in the suit, is '*conclusive* in a second suit between the same *parties* depending 'on the same question, although the subject matter of the second 'suit be different," "and parol evidence is admissible in the second 'suit for the purpose of showing what questions were controverted 'in the first action and the grounds on which it was determined." The earlier cases quoted above decide precisely the same principle. The case in 3 East, 345 & seq., was that in a former action of

trespass q. c. f. the issue on a special plea had been found against defendant by the verdict of a jury. A second action being brought, the defendant invoked a second time the defence which he had failed to establish at the *first* trial. The plaintiff set up the former determination of the issue, and upon demurrer to the replication, judgment was given for the plaintiff. The opinion of the court delivered by Lord Ellenborough is very learned, and the case is a leading one. It seems to me to be very apposite to the case at bar. Will it be said that such a special plea is impossible in ejectment, and so the *principle* of this decision cannot be invoked in aid of the appellant? This *was* said in the court below, but the answer is so obvious that I almost blush to give it. Let it be conceded that in ejectment only the general issue can be pleaded. Where the defendant appears under the *consent rule*, indeed, this is undeniable, (1 Chitty on Plead, 221) but where the defendant is under no necessity of conforming to such a rule, as is the case in Missouri, it is conceived that he may interpose any other plea that he prefers. Let that pass however. We are not considering a rule of *pleading*, but a canon of *evidence*. The canon is not to be disputed by the most hardy. Even the appellee only makes an attempt to deny its applicability, and for the success of his attempt he relies on the '*form*' of the action of ejectment. If his objection is worth *anything*, it must be because there is something in that form of action which radically changes the substance of things; and by no contrivance can a determination of any issue in an action of ejectment be made to conclude either party. This is an intelligible, but, it is submitted, a most untenable proposition. Whatever may be the forms of pleading in ejectment in England, it is presumed that there is not now, and never has been since 1825 in Missouri anything to prevent a jury in such an action from finding a *special verdict*. Will any one pretend that a special verdict in ejectment, followed by judgment, would be less conclusive as to any fact which it determined, than if the verdict had been taken in an action of *assumpsit*? There can be no doubt of the answer to this question; and it is worthy of remark how much the finding of the jury in this ejectment suit, taken in connection with the instructions of the

court, is assimilated to, and possesses all the property of, *a special verdict*.

Thus far nothing has been said of the peculiar statutes of Missouri respecting the conclusiveness of a judgment in ejectment, but reference to them seems to dispel all idea that there can be anything in the point made below in argument. By the Practice Act of 1849, (session acts of 1849, pp. 73 & seq.,) all distinction in the forms of action was abolished, and the New York code virtually adopted. Under this act it was always the opinion of the professton in Missouri that a judgment in ejectment was conclusive; which opinion was founded, in part, on the language of the first section of art. 12, (p. 88, sess. acts of 1849.) At the revising session in 1855, (see rev. co. of 1855, p. 695, §33,) there was for the first time an express statutory provision to this effect. The language used is quite as explicit and broad as that used in the New York act quoted by the court in 4 Barb. Sup. Court Rep. 457, Beebe vs. Elliott, where the court said, "a" "judgment in ejectment has the same force and efficacy as any" "other judgment. It was always conclusive as to the right of" "possession and the title to *mesne* profits, but it was not a bar" "in a second action of ejectment before the statute. Its ancient" "form was not devised for, nor did it claim to question the mere" "right of property, and the title might be tried as often as the" "failing party chose."

It seems to me that under this statute and the decisions quoted I am fully justified in treating the question as settled, that whatever conclusiveness may be predicated of the record of any judgment, may be predicated of a judgment in ejectment. The application of these principles to the case at bar is very easy.

It is demonstrated by the evidence given in the case at bar that the jury in the ejectment suit (decided at the October term 1856, between Miles and Caldwell, respecting this very land,) tried not only the question of the satisfaction of the mortgage, but this very question of fraud in fact, in relation to this very deed of Jan. 5, 1838, and determined that the first mortgage was satisfied, and that there was no such fraud. I say that this is demonstrated. It is shown that this deed was at that trial impeach-

ed by the defendant Caldwell for fraud, and that the court gave on that subject the following instructions, &c., (see p. 29 & 165 & fol. of the printed record.) Under these instructions the jury could not find for the plaintiff Miles, unless the two following propositions were established: 1st, That the mortgage debt to Gallaher was paid off and satisfied. 2nd, That the deed of Jan. 5, 1838, was free from fraud in fact. They were bound to find *both* these propositions for the plaintiff Miles. As long as the mortgage debt existed clearly he had no right of action, and accordingly a question was presented to the jury under the instructions of the court, whether that debt was satisfied or no. As long as that debt remained unsatisfied, all question respecting fraud in the deed of January 5, 1838, was wholly immaterial. If that debt were satisfied, then the other inquiry remained. The defendant *must* have given in evidence on that occasion his claims of title under Ely's deed to Tatlow of 1850; for, otherwise, he would have had no standing from which to impeach the deed of Jan. 5, 1838. It will be remembered that he *does* stand on this deed and claims under it the character of a *bona fide* purchaser for value. The deed of Jan. 5, 1838, was formally impeached for fraud; for we see the court telling the jury under what circumstances they will consider it fraudulent and void; moreover, it is admitted by both parties to this cause. [see p. 29 of pr. rec.] It is then impossible to shut our eyes to the fact that this issue was distinctly made, and the record tells us how it was determined. By the authority of all the cases just cited, that determination is conclusive upon the parties forever. It has seemed to the counsel for the appellant, from the beginning, that this consideration was decisive of the controversy, and that any other argument might be laid aside. But the merits of the case independent of this point were so strong, that he did not feel justified in leaving them unpresented to the court below, and now to this high tribunal. He has not dwelt upon it, but satisfies himself with presenting it briefly, and he hopes, perspicuously, to the attention of the Supreme Court.

If I had listened to my own convictions of the merits of this controversy, I should long since have desisted from adding anything to what seems to my mind so conclusive for the appel-

lant. But I have been not only admonished by the failure to impress their views on Judge Wells at the trial in the Circuit Court, but by the importance of the cause to my client, (for this is a *representative* case,) to extend my remarks to a great number of propositions, any one of which seems conclusive in my mind. And even now I have omitted all notice of several points made in the bill and argued in the court below. To these I will now very briefly allude.

It is stated in the bill with apparent confidence in the legal validity of the fact, if true, that Ely *recognised* the sale of the mortgaged premises under the judgment rendered in 1841, [see p. 3,] and it was said in argument that his consent to the sale validated it. Now, in the first place, there is no evidence of such consent until long afterwards. He was in town on the day of the sale and did not forbid it. Why should he? His property was not jeoparded by it, and if Gallaher chose to attempt a vain thing, was it Ely's bounden duty to restrain him from it? Ely was not even shown to be present at the sale.

But if he had been present and had in the fullest manner consented, he could not thereby have affected the rights of a subsequent mortgagee. No consent to, or omission to protect against, an illegal act can confer on that illegal act any validity, when the illegality grows out of, and is shown on the face of the act itself, and does not arise from something *dehors* the record. Assuredly I shall not detain the court further on this point.

2nd. It was said in the bill, and witnesses were asked questions to establish the fact, that much more property was put in the deed of Jan. 5, 1838, than was sufficient to secure the beneficiaries; and this was insisted on as a badge of fraud.

Allen Gallaher says that all the praperty, real and personal, assuming the title to be clear and the debts to be all good, was worth $55,000. To reach this result he rates all the land at $5 per acre—a preposterously high valuation as to most of it—but let that pass. Instead of Muldrow owing the debt of $3,000 to Ely, the latter was indebted to Muldrow. The debt of $15,000 from Marion College was lost by the insolvency of that seminary. There was *at least* $2000 worth of the land embraced in the mortgage,

(viz., the Gentry farm,) which was already encumbered for value. This makes a deduction of $20,000 from Mr. Gallaher's large estimate of $55,000. The remainder is $35,000, or about half of what Ely owed to Miss Carswell alone. It must be as wearisome to the court to listen to, as it is for me to make refutation of such positions.

3d. There was a good deal said in the bill about valuable and lasting improvements in good faith put on the land by Caldwell, for which, in case he lost the land, he claimed compensation. To which there are two short answers. In the first place, he is proved out of his own mouth to have known from the beginning the infirmity of his title; (see p. 152-4) in the second place, there were no such improvements made. Moreover the decree of the Circuit Court in no degree turns upon, or touches this topic or head of equity.

Many comments upon the whole case, as presented, occur to me. I am tempted, almost irresistibly, to dwell upon its more general and broad features. I have confined myself to the consideration of those points which have been the subject of attack, and have refrained from expressions of natural indignation at what I should call an atrocious attempt to perpetrate a hideous injustice under the forms of law, if I were not restrained by recollection of the fact, that the evidence and arguments adduced by Caldwell were sufficient in the eyes of the late Judge Wells, one of the ablest and purest men that ever adorned the judgment seat. I think that this eminent judge was under a delusion respecting this cause, and I have endeavored to demonstrate, that the record shows error for which the judgment should be reversed. But the fact, that a jurist of his admitted ability has been able to decide against the appellant on this record, while it excites my wonder, certainly goes far to extenuate the length of my remarks; while that very length forbids the addition of any word not absolutely necessary.

THOMAS T. GANTT,
Counsel for Appellant.

# In the Supreme Court of the U. S.

Appeal from the Circuit Court of the United States of the State of Missouri.

THOMAS J. MILES, Appellant.

*vs.*

WILLIAM D. CALDWELL, Appellee.

The appellee filed his bill in chancery to quiet the title to the eighty acres of land in controversy, and to enjoin a judgment at law obtained in an action of ejectment in said Court by the said Miles, against Caldwell.

But in this case in chancery, the original complainant Wm. D. Caldwell, now appellee, obtained the decree of the Circuit Court, and from that decree Thomas J. Miles appeals to this Court.

The points made, and the reason and authorities relied upon to sustain the decree of the Circuit Court, will be briefly stated.

Both parties, appellant and appellee, claim title from the same person, and it is unnecessary to trace the title to him

On the 18th day of November, 1837, said Ely made a mortgage, to secure borrowed money, to James Gallaher.

Judgement was rendered on the 5th day of May, 1841, and a sale made of the mortgaged property by the sheriff of the proper county, on the 12th day of September, 1842, and a deed, by the sheriff of the same date, made to said James Gallaher.

Then there are regular conveyances shown in the record,

from Gallaher to Caldwell, and those under whom he claims without notice of any conflicting right or equity against their title.

But *two* leading question arise, to be determined by the Court, one is the sufficiency of the appellee's title; the other is the validity of the appellant's claim of title to the land in controversy; but other incidental points bearing upon these, may arise in the investigation of the questions.

There can be no imputation of fraud against James Gallaher and those under him, and the title thus derived is complete as against appellant.

2d. The title of the appellee gave him the right of possession and those under whom he claimed from 1842 to 1856, before suit was brought or counter claim made.

3d. During this time the appellee made valuable improvements under the titles derived from Ely, who was authorized to sell and convey by virtue of a power of attorney from Mrs. Carswell and Samuel McClellan. (See record pp. 130 to 133 inclusive.)

The claim of the appellant depends upon the pretended mortgage of January 5, 1838, but that mortgage, if valid, would not affect the prior mortgage of Gallaher; but it is null and void for these reasons, viz.:

1st. The execution and acknowledgment were illegal.

2d. It conveyed perishable property which must be consumed within the five years.

3d. More property was included in the mortgage than was necessary to secure the pretended debt.

4th. Ely had power and authority to dispose of this property at his own will and pleasure.

5th Under this power he did actually sell twenty thousand dollars worth.

6th. The intent is manifest from the testimony in the case that it was to hinder and delay his creditors. (See the testimony. See Missouri Statutes page 283. Statutes of 1835. Depositions of Allen G. Gallaher, James H. Patterson, and

Mary Ann M. Patterson, Record from pages 102, to 130 inclusive. See 24 Mo. R. 581, 575, 65, and 6 Hill, N. Y. p. 438.)

7th. The purpose and intent of hindering and delaying creditors is manifested by the deed of trust made by said Ely on the 22nd day of November, 1837, which having been decided to be fraudulent and void was abandoned; and the mortgage under which the appellant now claims, was substituted to effectuate the same purpose.

8th. The fraudulent intent and purposes of Ely was known to Mrs. Carswell (who lived in his house) and Dr. McClellan, his son-in-law, as is shown by the evidence above referred to.

Again, the rights of the mortgagee Gallaher cannot be affected by the subsequent mortgage or foreclosure thereof; for several reasons.

1st. It is prior in order of time.

2d. In the pretended foreclosure by Carswell and McClellan of their mortgage, neither Gallaher, nor any one under him of record or in possession, were made parties to the proceedings.

3rd. The interest of Gallaher is *specially excepted and reserved for him* in the mortgage deed of Ely to Carswell and McClellan; also in the *judgment rendered thereon; also in the execution and sale and likewise in the Sheriff's deed.*
(See Record from page 69 to 95 inclusive.)

From all the evidence in the case it is manifest that the appellee, Caldwell, has a clear equitable title and that the appellant, Miles, has no shadow of claim, and that the decree should be affirmed.

JAMES S. GREEN,
*Attorney for Appellee.*